Voluntary Sector Initiative
Joint Regulatory Table

Improving the Regulatory Environment for the Charitable Sector

Interim Recommendations

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Preface

This report contains a number of terms widely used within the charitable sector. To facilitate an understanding of the issues discussed and enable everyone to fully participate in the consultations that the Joint Regulatory Table will hold across Canada, this preface provides clear explanations of the following terms:

Accessibility and Transparency

The *Income Tax Act* generally prevents the Canada Customs and Revenue Agency (CCRA) from releasing any information about the people and organizations with which it deals. The Act does, however, allow the Charities Directorate to release a fair bit of information that it collects about charities. This helps guide the choices of people who want to give to charity. But much of the decision-making inside the Directorate continues to be guarded by confidentiality rules.

Appeal

An organization that does not agree with a decision of the Charities Directorate has only one formal remedy – appealing the decision to the Federal Court of Appeal. This is a high level court, with formal proceedings, and very few cases actually go to court.

Charities

Charities form one segment of the broader non-profit sector.

The concept of charities is not defined in legislation. The courts decide what is charitable.

To be called a charity, an organization must (amongst other qualifications) have a purpose that the courts have classified as charitable. The courts have recognized a wide range of such purposes. For example, the following types of organizations can all be charities:

hospitals	museums	volunteer fire departments
food banks	churches	homeless shelters

schools	heritage societies	conservation areas
daycares	nursing homes	community halls

Charities Directorate

The Directorate is the part of the CCRA that administers the *Income Tax Act* provisions that relate to registered charities. The Directorate is located in Ottawa and has some 175 employees, who:

- decide which organizations qualify for registration, according to the law of charity developed by the courts and the provisions of the *Income Tax Act*;
- check that, once registered, organizations continue to qualify;
- de-register organizations that no longer qualify;
- answer questions from charities – by letter, phone, publications, and in person; and
- provide the public with information about charities.

Registered charities

A charity that is registered with the CCRA can issue special receipts when it receives gifts. These receipts in turn entitle the people who made the gifts to claim a credit when they fill out their tax return.

To keep its registration, the charity has to meet certain conditions set out in the *Income Tax Act*. One condition is filing an annual information return, which is available to the general public.

Regulating charities

The *Income Tax Act* makes the CCRA responsible for administering the Act's charity provisions. In some countries, an institution other than the tax authority decides which organizations qualify as charitable. In other countries, decisions like this are shared among different bodies, including some with representatives from the charitable sector.

The *Income Tax Act* is just one way charities are regulated. Canada's constitution gives to the provinces the power to pass legislation

covering charities. Only a few provinces have passed such legislation, and of these, only one has set up a body to enforce the legislation.

Traditionally, the Attorney General, as the principal law officer of the province, and the courts have played a role in protecting charities from abuse.

Sanctions

If a charity does not follow the rules in the *Income Tax Act*, the Charities Directorate can take away its registration. The way this penalty works can seriously affect an organization. Often it has to shut down as a result. Because de-registration can be so severe, it may only be appropriate in the worst cases. For lesser cases of non-compliance, however, there are currently no other legal penalties available.

Introduction

The Voluntary Sector Initiative (VSI) announced in June 2000 is a joint task of the voluntary sector and the Government of Canada. It is a unique opportunity to focus on the voluntary sector of Canadian society, a sector equal in importance to the public and private sectors.

The long-term objective of the VSI is to strengthen the voluntary sector's capacity to meet the challenges of the future, and to improve the relationship between the sector and the federal government and their ability to serve Canadians.

Improving Canada's quality of life within healthy and economically strong communities requires a robust voluntary sector. A vibrant sector plays an important role in reinforcing social trust, social networks and common values. For many federal government departments, partnerships with the sector are essential to the fulfillment of their mandates and are a cornerstone to the delivery of programs and services.

The 1999 landmark document called *Working Together*[1] was a product of a joint policy exploration process undertaken by a group of voluntary sector leaders and senior government officials. This joint exercise, which has come to be known as the Joint Tables Process, delineated three distinct areas requiring strategic investment and attention:

1. improving the relationship between the government and the sector,
2. enhancing the capacity of the sector to serve Canadians, and
3. improving the legislative and regulatory environment in which the sector operates.

To address the third area, a Joint Regulatory Table was formed in 2001.[2] The Table has a four-part mandate.

[1] *Working Together: A Government of Canada/Voluntary Sector Joint Initiative*, 1999.
[2] Members of the Table are listed in Appendix 3.

The first area for study and recommendation is accessibility and transparency of the regulatory regime. The concern has been that there is not enough information available about registered charities and about how the CCRA makes decisions - especially decisions on registration and de-registration. The Table is trying to find a balance between allowing individual organizations to deal confidentially with the regulator and providing the public with more information on charities and regulatory decision-making.

The second area for study and recommendation is the possibility of introducing intermediate sanctions for charities that are not complying with the rules for continued registered status. Currently, under the *Income Tax Act* there is only one consequence for non-compliance - de-registration - a penalty that is considered by many to be too harsh except for severe breaches of the law. The Table is examining various alternative sanctions to allow for an appropriate regulatory response when infractions of the law occur.

We are also looking at a system of recourse for organizations that disagree with decisions made by the regulator. Currently, appeals of CCRA decisions to deny or revoke charitable registration must be made to the Federal Court of Appeal. The Table is considering how the appeal process can be made easier without making it more cumbersome and costly for charities. At the same time, we are looking at how to bring more cases before the courts, so that the decisions can clarify charity law in complex or novel cases.

Finally, the Table is also examining the issue of institutional reform. We have more fully developed the range of regulatory models outlined in the 1999 Joint Tables process. The models being examined include an enhanced Charities Directorate that would continue to operate within CCRA, a complementary agency that would work alongside CCRA, and an independent commission. In examining these models, the Table is working to:

- ensure public confidence in voluntary organizations,
- maintain the integrity of the tax system, and
- ensure a supportive and enabling environment for voluntary organizations.

Through its deliberations, the Joint Regulatory Table has addressed each of these issues. The results of these deliberations, including interim

recommendations are contained in this report. The views presented are not necessarily those of all members of the Table.

Consultations with Canadians and representatives of the voluntary sector on the interim recommendations will be conducted between September and November 2002. Based on those consultations, the Joint Regulatory Table will make its final recommendations to the government no later than March 2003.

To learn how you can provide comments and/or participate in the planned consultations, go to www.vsi-isbc.

Chapter 1: Accessibility & Transparency

Introduction

The issue of transparency received considerable attention from the Table on Improving the Regulatory Framework. In its contribution, the *Working Together* report (1999), it defined transparency as covering informing, reporting, responding to requests for information, and conducting regulatory affairs in a manner that can be easily observed and understood. Over the last four years, the amount of information that the Charities Directorate of Canada Customs and Revenue Agency can release about a charity has increased significantly. But it is still limited. The *Income Tax Act* has, for good reason, a bias that information provided by a taxpayer should remain confidential. Even though charities (and not-for-profit organizations that are not registered charities) do not pay taxes, they are considered "taxpayers" under the Act. Therefore, the majority of information about them was, in the past, considered confidential.

Until a legislative change in 1998, the Charities Directorate was only allowed to confirm that an agency is or was a registered charity, the location of the charity, its registration number and the date of registration. Also, the Directorate could release the information provided by charities in the public portion of their annual T3010, *Registered Charity Information Return*, and, with the charity's permission, could make its annual financial statements available on request. If a charity's registration had been revoked, the revocation date could also be released.

As a result of the 1998 amendment, the Charities Directorate now may, at the request of any individual, release the following additional information about a registered charity:

- the charity's governing documents, including its statement of purpose;
- information provided on the application form;
- names of the charity's directors and the periods during which they were directors;

- the letter notifying an organization of its registration as a charity, including any warnings or conditions; and

- the letter sent by or on behalf of the Minister to a charity revoking its registration including the reasons.

Despite this amendment, there is still much information held by the Charities Directorate that cannot be or is not released, including information relating to an application for charitable registration that is denied. Information about the Directorate's policies and operational guidance to its employees is not published. People cannot find out whether a charity has been audited or the results of that audit, unless the charity is deregistered.

Current rules raise a significant issue – how to balance privacy that should be enjoyed by charities dealing with the regulator with transparency of the regulator's policies, procedures, and decisions.

We considered what information should be readily available to the public, either on request or through a mandated requirement that it be published. At the same time, we also considered the impact of the wholesale release of information about a charity. For example, if a charity is about to be audited, should that fact be known? Would it not help an unscrupulous organization to avoid detection? Would it not damage the public's trust in a charity, even if it were eventually found to be blameless?

In order to address these concerns, we have come up with a series of recommendations covering the following documents:

- documents related to an application,

- documents related to a compliance action,

- documents on a charity's files that do not relate to either applying or complying, and

- other information that would promote accessibility and transparency such as the policies and procedures of the regulator and court decisions and precedents from previous decisions of the regulator.

Even with the amendment of 1998, there is not enough information available to allow the public – including other charities – to assess the performance of

Canada Customs and Revenue Agency (CCRA). We are convinced that the regulator must be open to greater scrutiny.

However, we also accept the fact that certain information should be withheld to protect the privacy of individuals as well as to avoid "tarring" a charity that has done nothing wrong.

In reaching its recommendations on the release of information, we looked at the "life cycle" of a charity and considered what information the regulator gathers at each stage. We then examined whether that information should be released or kept confidential.

Documents related to an application

Before a decision has been made

Normally, the first time the regulator becomes aware of an organization is when it applies for registration as a charity. There is some disagreement as to whether the regulator should, before a decision is made, release the fact that an organization has applied for registration. The *Working Together* report said this information should be available. With respect, we disagree.

We do not see the benefit that would come from advertising the fact that a certain organization has applied for charitable status. It is unlikely that individuals will be able to give information that is relevant in determining whether the applicant's proposed purposes are charitable or not. On the other hand, we see room for significant mischief. Individuals or organizations that are opposed to a particular group's beliefs, or who might see the applicant as a potential competitor, could raise objections to the application. If an examiner were to receive and consider an objection, then procedural rules would have to be established to allow the applicant to examine the objector and to submit additional material. We believe that this would create a procedural logjam.

If someone believes that there are valid objections to the registration of a particular charity, the regulator could use that information as part of its compliance program. After considering the objection, it could decide whether or not closer scrutiny must be given to the newly registered charity.

Therefore, we conclude that no information should be made available about an applicant until the regulator decides on the application.

After a decision has been made

By contrast, we believe that significantly more information should be available about the regulator's decision after it is made.[3]

The first information that should be available is the reasons for the regulator's decision. As a general rule, we believe that reasons should be given, and should be publicly available, for every registration decision. The reasons do not always have to be an in-depth explanation. If, for example, a new church is registered, the regulator need only say that its decision was based on a conclusion that the applicant falls into the "advancement of religion" category. On the other hand, if the applicant's charitable purpose is a novel one or represents a new interpretation of a charitable purpose, then the purposes of the organization should be given, as well as the category under which it has been registered. Also, an explanation of the reasoning that led to its registration should be provided.

Where an application is denied, the reasons should always be more complete and should include the organization's name. This may take the form of releasing the Administrative Fairness Letter in which the regulator states its preliminary determination and the reasons, or it may be in some other format. If the organization is appealing the decision, any release of information should note this fact.

We believe that the reasons for a decision, a critically important part of the transparency issue, should be **actively released**. The regulator should not wait until it is asked for a list of denials or reasons, but should actively publish its decisions on its Website. In the case of approvals, this may be linked to the

[3] In 1996, the Ontario Law Reform Commission, in its *Report on the Law of Charities*, noted that the Charities Directorate deals with some 4,000 applications and de-registers some 2,000 organizations each year, and in almost all cases there is no public record of the decision. It urged the Directorate to publish an annual report along the lines of that published by the Charity Commissioners for England and Wales. Arthur Drache, in "Charities, Public Benefit and the Canadian Income Tax System" (1998), pointed to the confidentiality provisions in the *Income Tax Act* as responsible for leaving practitioners in complete ignorance of what types of organizations were or were not being registered. He urged that key decisions should be published.

charity's name on the register. In the case of denials, some other part of the Website can be used.

We recognize that in a small number of cases, provisions of the federal *Privacy Act* may create a barrier to full release of information about a denied application. In those cases, the regulator should withhold as little information as possible. The *Privacy Act* should be used with precision.

While the regulator should actively publish the decisions and reasons, further information about the application should **only be available on request**. We would maintain the current provisions that allow for the public portions of the application for registration to be made available to anyone requesting them. We would also allow that same information for organizations that do not obtain registration to be available on request. Application files can be voluminous, and contain numerous references that would have to be erased before public release in order to comply with the provisions of the *Privacy Act*. We believe there is insufficient justification for this additional work, in that there would be adequate information available to judge the regulatory authority's decision making if our recommendations are adopted.

Other information on an application file should **remain available only to the applicant**. This information includes communications between the applicant and regulator, internal memos prepared by the regulator's staff, research materials gathered by the regulator, and communications between the regulator and third parties.

The regulator can, from time to time, expect to seek legal opinions about particular issues. These opinions are privileged and should not be disclosed to the applicant or the public.

Documents related to a compliance action

Before the regulator has decided what action to take[4]

Part of a regulator's role is to ensure that a charity complies with the law. Usually compliance actions are audits of the charity's books and records. These activities are part of enforcing the law. Therefore, we do not believe that any internal or external documents related to ongoing compliance investigations should be disclosed.

After the regulator has decided what action to take

We have struggled with the question of whether or not the fact that a charity has been audited should be disclosed. On the one hand, we are fearful that someone will come to unfavourable conclusions about a charity simply because it has been audited. On the other hand, we think it can be beneficial to a charity, and to the public's trust in the sector, for audits to be made public. We have concluded that the regulator should be allowed to disclose the fact that an audit has taken place if it is requested to confirm this.

That raises the question of whether results from an audit should be reported. To be consistent with our recommendations on Intermediate Sanctions[5], we conclude they should not. However, we would allow the regulator to say, in response to a question on what the outcome of an audit was, whether a Tier 3 (financial penalty or suspension of qualified donee status) or Tier 4 (de-registration) sanction was imposed. As noted in the chapter on Intermediate Sanctions, this information would already be available, in that these sanctions would be publicly reported.

If an audit reveals information that leads to an application to de-register a charity, that information too will be available through the sanctions regime we have recommended.

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[4] In relation to the regulatory authority's compliance program, we exclude from consideration the special procedures for handling of security or criminal intelligence reports under the *Anti-terrorism Act*.

[5] Our recommendations related to Intermediate Sanctions are contained in a later chapter in this report.

The detailed information that was obtained during the audit as well as the regulator's instructions to the auditor should not be publicly available.[6] Legal opinions obtained by the regulator, because they are privileged, should also not be available.

Documents on a charity's files that do not relate to either the application for registration or a compliance action of the regulator

As a normal part of its operation, a regulator will gather information about a charity including information filed by the charity as required by law or policy and decisions of the regulator on such issues as accumulating assets or obtaining permission not to meet the disbursement quota. Information filed by the charity as a result of law or policy should be available to anyone on request, as should any response from the regulator.

By law, every charity must file a T3010, *Registered Charity Information Return* each year. The form (which has been redesigned as a result of our work) already contains information that is available to the public as well as certain confidential information. We would maintain the status quo and make the annual Information Returns available on request. As the regulator's technological capabilities improve, we recommend that Returns for each charity be available on-line. We leave it to specialists to figure out how best to accomplish that and encourage them to give priority to the project.

We are recommending one change related to information filed with the annual *Information Return* (T3010). The form requires that every charity file its financial statements with the Return. However, the charity is allowed to decide whether or not the financial statements should be made public. The Charities Directorate's position is that, because the statements are attached to the form, but not part of it, Directorate staff have no power to release the statements without the charity's consent.

We think this discretion should be taken away from charities and the financial statements should be released on request. While the T3010 does contain some

[6] Note, however, that in the chapter on Intermediate Sanctions, the Table is recommending that under certain circumstances, information obtained during an audit should be made available to appropriate enforcement authorities.

financial-reporting information, the financial statements provide more information and sometimes information that is particularly important to understanding how a charity operates. Information on such issues as related-party transactions and contingent liabilities is clearly relevant to people with an interest in a particular charity. We do, therefore, recommend that the necessary legislative change be made to allow for release of financial statements filed by a charity.

We would maintain an exemption only for that small number of religious organizations that currently are exempt from certain reporting requirements. These charities do not receive gifts from other charities nor do they issue receipts for donations.[7]

Information not dealing with any specific organization

There is regulatory information that could be made available subject to the provisions of the *Access to Information Act* and the *Privacy Act*. These include:

- policies and procedures,
- a list of regular charities,
- a research database on court decisions,
- draft policies ready for consultation, and
- an annual report on operations and service standards.

Policies and procedures

The current procedures leave the charitable sector, its legal advisors, and the public "in the dark" about how CCRA exercises its discretion. When an organization is denied registration as a charity, that information will be made public only if the organization appeals the decision to the Federal Court of

[7] The exemption was granted in 1977, when the T3010 first became a public document. Some 300 organizations are covered by the exemption. They mainly hold funds to provide pensions for members of various religious orders.

Appeal, an unlikely occurrence, or if the organization chooses to share with others the letter by which its application was denied.

The lack of precedents, when combined with the lack of availability of CCRA's policies and operational guidance, make it difficult for organizations to determine, in advance, whether they will qualify or how they need to structure themselves so that they will qualify for registration.

When examiners review an application for registration, they have to take into account internal policies of the CCRA. While this type of information is already accessible under the *Access to Information Act*, we conclude that steps should be taken to actively publish it. The Charity Commission of England and Wales is currently involved in a process to make all such information available on its Website, and we believe a similar initiative should occur in Canada. We accept that the CCRA's existing material is not compiled in a way that will make this an easy exercise, but it is one we believe is necessary. We do not think it desirable for all policies to be released. Again, we would follow the provisions of the *Access to Information Act*. In some cases, the policies and operational guidance are in the nature of investigative information, "triggers" that an examiner should look for to avoid being "taken in" by an unscrupulous applicant. This sort of "intelligence" information should remain confidential.

A list of registered charities

Currently, people can search on the CCRA Website for a list of registered charities. That list also shows the address and designation of each charity.[8] The regulator should continue to maintain a searchable list of registered charities. As time and resources permit, additional information should be made available through that list, and we have identified below what some of that information might be.

This practice is consistent with practices in other jurisdictions. For example, in England and Wales, the *Charities Act*, 1993, requires the Charity Commission to maintain a register containing the name of every registered charity and any other information that the Commissioners think should be included. The

[8] A registered charity may be designated as a charitable organization, a public foundation, or a private foundation.

register is open to public inspection, as are "copies (or particulars) of the trusts of any registered charity as supplied to the Commissioners."

A research database on court decisions

For the same reason that we believe the regulator's policies and procedures should be available, we encourage the regulator to include on its Website a searchable version of a database that includes:

- information about court decisions,
- precedents from previous decisions of the regulator, and
- information from other regulatory bodies that may be of value to people seeking information about charities.

Draft policies ready for consultation

Along with its publications, the Charities Directorate has, over the last several years, done an effective job of making draft policy documents available when seeking public consultation. We encourage the regulator to continue this step, although we also encourage it to find ways to make more broadly known that the drafts have been posted on the Website and that public comment is invited.

As part of making the regulator's Website a key resource for charities wanting to track and respond to proposed changes in the regulatory environment, we also urge that the Website be used to notify charities of impending legislative amendments.

Operational guidance

The sector, the public and, we believe, the regulator itself would also be well served if the regulator was more proactive in releasing operational guidance to charities. Currently, the Charities Directorate issues periodic newsletters to charities containing information that is of value to ensure that the charities remain in compliance with law. The Directorate, through its compliance work and its client-assistance work, is in a unique position to identify trends that

may be worrisome or problematic. We believe the regulator needs to be far more active in providing information and advice.

This role should not come into play only after an organization has been investigated or sanctioned. The regulator should, through newsletters, its Website, and appearances by its staff at events involving charities, be working diligently to communicate important operational information to charities. We acknowledge that the regulator has, over the past several years, done a much better job of ensuring its publications are available more widely. However, we do not believe it should wait until a publication is necessary and developed before making this sort of operational guidance available.

We believe there is public interest in the administrative functioning of the regulator. For that reason, we suggest that the regulator publish an annual report with statistical data on its operation as well as information about its budget, staff complement, and related information. We also encourage the regulator to publish regularly its established service standards and the data to indicate how well it meets those standards.

Chapter 2: Appeals

The existing appeals system has been described as not easily accessible and too expensive. Because only a few cases have been decided, there is insufficient guidance for the regulatory authority and the voluntary sector. Reform of the system should allow for greater access to appeals and a richer accumulation of expertise by adjudicators.[9]

The Current Environment

Role of the courts

Currently the *Income Tax Act* specifies that organizations must turn to the Federal Court of Appeal, if the Charities Directorate:

- denies their application for registration as a charity;
- takes away their registration; or
- gives them a designation (as a charitable organization, public foundation, or private foundation) with which they disagree.

Almost all other disputes[10] under the *Income Tax Act* use the Tax Court as the first court level, with the Federal Court of Appeal serving as the appellate court.

The Act contains no appeal provisions for the many decisions the Charities Directorate makes that affect how charities operate on an ongoing basis. These mainly involve special permissions relating to the minimum amount that charities have to spend on their programs each year. However, the courts can still review these decisions, like all administrative decisions.[11]

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[9] *Working Together: A Government of Canada/Voluntary Sector Joint Initiative*, 1999.

[10] Apart from the decisions of the Charities Directorate, the only other CCRA decisions that are appealable directly to the Federal Court of Appeal are those of the Registered Plans Directorate (registered pension plans, registered education savings plans).

[11] The courts have the jurisdiction to review administrative decisions. Such a review usually focuses on how a decision is reached, in order to ensure procedural fairness in the decision making and that the decision is not unreasonable. If an application for judicial review is successful, the court normally sends the matter back to the administrative body for decision instead of substituting its own decision.

Internal Administrative Review

The Act also contains no provisions for any administrative review[12] of the Charities Directorate's decisions, short of a formal appeal to the court. For nearly all other tax issues, the Act sets out procedures for objections and appeals, as administered by the Canada Customs and Revenue Agency's (CCRA) Appeals Branch. This internal review process leads to a fresh look at a case.

While Appeals Branch officers base their decisions on the facts that have already been recorded, they often receive and consider new information that was not available at the local tax service office. If a person is not satisfied with the Appeals Branch decision, the case can then be appealed to the Tax Court. The person also has the option of proceeding directly to Tax Court, rather than dealing first with the Appeals Branch.

The Federal Court has held that procedural fairness obligates the Charities Directorate to invite submissions from an affected charity before proceeding to de-register it.[13] Although the Court has not called for submissions from an organization for the registration process, this would likely be required under current principles of procedural fairness.

In practice the Charities Directorate, in handling both de-registrations and registrations, does invite submissions. It presents its preliminary assessment in an "administrative fairness letter" to an organization and invites it to respond to the concerns the Directorate has raised. Organizations can and do reply by telephoning or meeting with Directorate officials, but usually respond only in writing. Afterwards, if the decision is a negative, the decision is reviewed by each higher level in the Directorate until the Director General issues a Final Denial or De-registration Letter.[14] Once this letter is signed, the administrative

[12] These are internal processes within the original decision-making body. Various administrative decision-making bodies employ a wide variety of procedures—some review panels exist within the usual decision-making hierarchy, while others are removed from it; some focus on service complaints, while others study the correctness of the original decision; some accept new evidence, meet with the people seeking recourse, and employ alternative dispute resolution techniques such as mediation and arbitration, while others do not. Review processes are usually private, and decisions are often not published.

[13] *In re Renaissance International* v. *M.N.R.* 83 D.T.C. 5024.

[14] The Directorate uses somewhat different terminology for the various stages of de-registration, because de-registrations become effective only when the decision is published in the *Canada Gazette*, not when the Director General signs the Final Letter.

process is over, and any further proceedings must be at the judicial level.

Review of Positive Decisions

No comparable appeals procedures exist to check the correctness of positive decisions. This is because there is no right of third parties to challenge the CCRA's decision either to register or to maintain the registration of a charity.

Recent Experience

Between 1980 and 2001, 131 charity appeals have been made: 28 from proposed de-registrations and the rest from the Charities Directorate's refusal to register an organization. (There have been no appeals over a charity's designation.) Here is the outcome of these appeals:

Cases still pending	9
Went to hearing; organization registered	5
Case discontinued; organization registered	26
Went to hearing; organization not registered	20
Appeal withdrawn, or dismissed by the court; organization not registered	71

These figures do not tell us how many organizations would use a more accessible appeals system if one were in place. The best estimate we could arrive at is that a new system could attract some 70 charity cases each year.[15]

During the last 10 years, the Federal Court of Appeal has heard 14 charity cases. For these, the average time between launching the appeal

[15] This estimate is calculated by adding: (1) the existing rate of appeals to the Federal Court of Appeal (an average of six a year); (2) roughly half of the organizations being de-registered for serious forms of non-compliance (for an average of 13 to 14 a year); (3) roughly half of the organizations applying for registration that are formally turned down (for an average of 12 a year); and (4) 10% of the organizations that drop out of the registration process at a late stage, based on the assumption that some of these applicants might be encouraged to pursue their applications through to a formal denial if they knew that doing so would enable them to apply to a more accessible appeals system (for an average of 37 a year). Note the estimate does not include charity cases arising from the regulator's use of the intermediate sanctions the Table is proposing in another chapter.

and the judgement being rendered was 23 months for cases involving a refusal to register and 35 months for cases involving a de-registration.

Perhaps the most striking thing about the number of appeals that have been launched from the Charities Directorate's decisions is that only 25 charity cases in total have ever gone to court. (The Directorate deals with some 4,000 applications each year.) And of these 25 cases, nearly half have produced judgements that were brief, dealt with procedural issues, or otherwise did not produce precedents in charity law. In making its decisions, the Directorate must rely largely on the common law, found in previous court decisions, to determine what is and is not charitable. While the Directorate can look at charity decisions made at the provincial level (for example, decisions dealing with municipal taxation or the interpreting of wills) and similar cases in other countries, these are not binding in the case of charitable registration under the Canadian *Income Tax Act.*

Arthur Drache, in his paper *Charities, Public Benefit and the Canadian Income Tax System* (1998) stated that reform is needed because costs and other constraints have limited the number of cases proceeding to appeal. His ideal solution was to create a "charity court" as a stand-alone body that would develop its own expertise, but the Tax Court would be an acceptable alternative. The procedure in the Federal Court of Appeal is, in his view, inappropriate.

In a later paper, (Drache and Hunter, *A Canadian Charity Tribunal: A Proposal for Implementation,* 2000), the authors point out that the process in the Federal Court of Appeal is an appeal, and not a hearing *de novo.*[16] This means that the responsibility is on the organization to prove that the Charities Directorate's decision was wrong. Also, the appellant does not have the right of examination for discovery, calling witnesses, and cross-examining the government's decision makers for potential bias.

Patrick Monahan in *Federal Regulation of Charities* (2000) regarded the current appeal process as anomalous and outdated. It places a considerable financial burden on an organization, requiring the

[16] "*De novo*" means staring afresh. Typically, such hearings are held at a lower court level than an appellate court. In a hearing *de novo*, the court does not rely on previously gathered evidence. Rather, its decisions turn on the evidence that is brought before it. An oral hearing is common, but a hearing can be held on a documentary basis.

organization to retain legal counsel and prepare significant documentation.[17] The Federal Court of Appeal itself, he noted, had questioned a process that asks it to "review relevant questions of law and fact without the benefit of any findings of fact by a trial court and indeed without the benefit of any sworn evidence."[18] Monahan considered whether a special tribunal holding a hearing *de novo* would be the best option but doubted that there would be sufficient workload to justify appointing such a body. Instead, he opted for the Tax Court as the logical place for hearings, with the organization having the option of using that Court's informal procedures.

The Broadbent Panel in its report, *Improving Governance and Accountability in Canada's Voluntary Sector* (1999) also urged that the appeal process be made more accessible and less expensive, and proposed that appeals should go to the Tax Court.

The Table on Improving the Regulatory Framework, in its contribution to *Working Together: A Government of Canada/Voluntary Sector Joint Initiative* (1999) proposed that the appeals system allow for a hearing *de novo.* Tax Court was not recommended as the venue for such a hearing, but rather a newly created quasi-judicial body. They recommended that, if the initial decision making stayed with the CCRA, it should establish a reconsideration of the initial decision by an internal review process. They also recommended the use of alternative procedures for resolving disputes as an alternative to court proceedings.

Factors Affecting the Reform of the Existing Appeals System

In weighing the various options for reform, we have kept the following objectives in mind:

- transparency of the proceedings to the organization, the voluntary sector, and the general public;

[17] The Federal Court of Appeal decides cases "on the record," that is, on the evidence that has already been gathered. The "record" in charity cases is made up of the materials assembled by the organization and the CCRA during the course of an application or de-registration. Moreover, the proceedings of the Federal Court of Appeal are formal. Unless the court decides otherwise (which it has done in a few charity cases), parties appearing before it must be represented by counsel.

[18] *Human Life International in Canada Inc.* v. *Minister of National Revenue* [1998] 3 F.C. 202.

- correctness of the decision, including consistency in the decision making;
- independence of the adjudicator;
- prompt resolution of disputes;
- accessibility, in terms of location, procedures, and costs to the organization;
- creation of precedents for the guidance of the regulatory authority and the sector;
- creation of a complete evidentiary record; and
- cost to government of establishing and maintaining the appeals system, including not duplicating existing mechanisms for review that could be readily adapted to handle charity cases.

Transparency

Transparency is a factor affecting how the decision making is perceived. On the one hand, we have the courts with their decisions and the evidence they relied upon usually fully in the public domain. On the other hand, internal review panels sometimes operate on a confidential basis. This enables them to use various alternative dispute resolution techniques, but does nothing to promote an understanding of their decisions.[19]

Correctness of the decision

A primary goal of any appeals decision is to make sure that the correct decision is made. A "correct" decision is one that is not only technically right in law, but also one that is generally perceived to be just. This is because the decision maker has reached a decision that is consistent with previous cases while, where appropriate, developing charity law that reflects changes in society. How much flexibility in developing the law is expected from an administrative body? At what

[19] Moreover, as pointed out in the chapter on Accessibility and Transparency, transparency must be balanced against other values, such as protecting an organization's reputation from unwarranted harm.

point does flexibility tip over into decision making that is inconsistent and lacking a proper legal basis?

Independence of the decision maker

"Correct" decisions depend on many factors. One factor affecting how a question is perceived is the degree of independence held by the decision maker. On a continuum, judges lie at the far end of independence. Their independence from all influences is a constitutional guarantee. Other decision makers have lesser degrees of independence. A review panel inside the regulatory authority may be seen to operate with less independence from the regulatory authority than a quasi-judicial tribunal completely outside the agency. A quasi-judicial tribunal may not be seen by the public to operate as independently as a judge.

In considering procedures at the various levels of appeal, another consideration is what role, if any, third-party intervenors should play. One concern is the inability of those not directly affected to provide input in the initial decision making. Should such a role be built into the appeals mechanisms, recognizing that those opposed to a particular organization may want to participate as well as those supporting it? Another factor to consider is that such interventions can eat up the time of a court or tribunal, unless some limitation is placed upon them.

If a lower-level decision maker is to hear a case before it goes to the Federal Court of Appeal, are there any candidates for this role that have developed expertise in charity law or that are more familiar with working with common law as opposed to statute law?

Prompt resolution to disputes

The courts cannot handle every dispute that arises in the course of administrative decision making. How, then, to decide which cases can and should proceed to the court level? At one level, the answer is that this is a matter for the affected organization to decide. But if the organization in question does not understand the legal issues in play, if it simply wants someone to take a second look at its case, or if it has suffered as a result of a decision at the initial level, an administrative review process may be more appropriate than going to court.

Nevertheless, some cases should go before a court as soon as possible because they are potentially precedent setting. In the chapter on Institutional Reform, we have stressed the importance of precedents for the proper functioning of a regulatory system that relies on a common law definition of charity. However, securing sufficient precedents raises a number of issues. Should organizations involved in such cases also have to exhaust the administrative review process before they proceed to court? And what needs to be done to ensure that they do get into court and present the best possible case to the judge? The organization in question may decide not to pursue its case, because it does not have the resources necessary to prepare a case. A funding mechanism for appeals in turn raises questions about who decides which cases to bring forward, on what grounds these decisions should be made, and how much money should be available.

Accessibility

Developing more precedents needs to be balanced against providing a more accessible appeals system. By accessible, we do not simply mean geographically accessible. The Federal Court of Appeal holds hearings at 17 venues across the country, and for charities an even greater number of locations may be desirable. However, the main concern is the ease and speed with which an appeals mechanism can be set in motion and the simplicity of the procedures at any subsequent hearing. Highly informal procedures are not likely to provide persuasive precedents, but they may serve a purpose that some may consider to be equally or more valuable. That is to provide organizations with an inexpensive and rapid means to have someone hear their case in a more informal atmosphere.

Obtaining more precedents

Precedents to guide administrative decision making are particularly important when the regulatory body has to rely on the common law to determine what is and is not charitable. The existing system has yielded only a handful of Federal Court of Appeal decisions on what it means to be a charity for the purposes of the *Income Tax Act*. Clearly, more precedents are highly desirable. However, a legally binding precedent means going to court with all the attendant costs and delays. Perhaps as well, it should be remembered that decisions at the pre-court

level could offer persuasive guidance, if that decision making becomes recognized as being of high quality and if those decisions can be published in some form.

Constituting the record

In designing an appeals system, a critical issue is deciding at what point the case record is constituted, and what type of proceedings are necessary to properly constitute such a record. Once the record is constituted, any further appeals are based on the evidence set out in that record, and appeals turn on whether the law has been correctly applied to the facts at hand. Currently the record is the Final Decision of the Charities Directorate, plus all materials contained in the file that relate to that decision, such as the information provided by the organization in support of its application or the audit results that led up to a proposed de-registration. Many would argue that this prematurely closes off the possibility of introducing new evidence. Some would go further and say that such a record is deficient in not allowing sworn testimony and the cross-examination of witnesses.

Costs

Another concern arises as to the case that an organization might present to these next levels of judicial decision making. Good decisions typically depend on both parties fully presenting relevant evidence, jurisprudence, and arguments before the decision maker. If relevant evidence or information is not presented, perhaps because one party does not have the financial backing and legal knowledge to fully argue its case, the decision may not be as useful as it could have been.

Administrative systems vary in their layers of appeal. The more layers, the more opportunities an appellant has to make its case. But the more layers, the more time consuming and costly the system becomes.

The efficiency of an appeals system has to be judged not only in terms of how expensive it is to the parties using it, but also in terms of how much it costs the government to establish and maintain it. There are cost implications to proposals to change the existing system by adding new layers of appeal or new institutions. Potentially, some proposals could reduce government costs if more informal procedures replace a

hearing before the Federal Court of Appeal. But for other proposals, such as creating a new tribunal that would specialize in charity law, we would need to be convinced that no existing government review mechanism could adequately take its place.

Reform Recommendations

We accept the arguments in favour of reforming the existing appeals system. The single option now available, an appeal to the Federal Court of Appeal, has failed to create sufficient precedents or to provide organizations with an accessible and quick means of appeal. Instead, we propose an appeals system for charity decisions that involves the following elements:

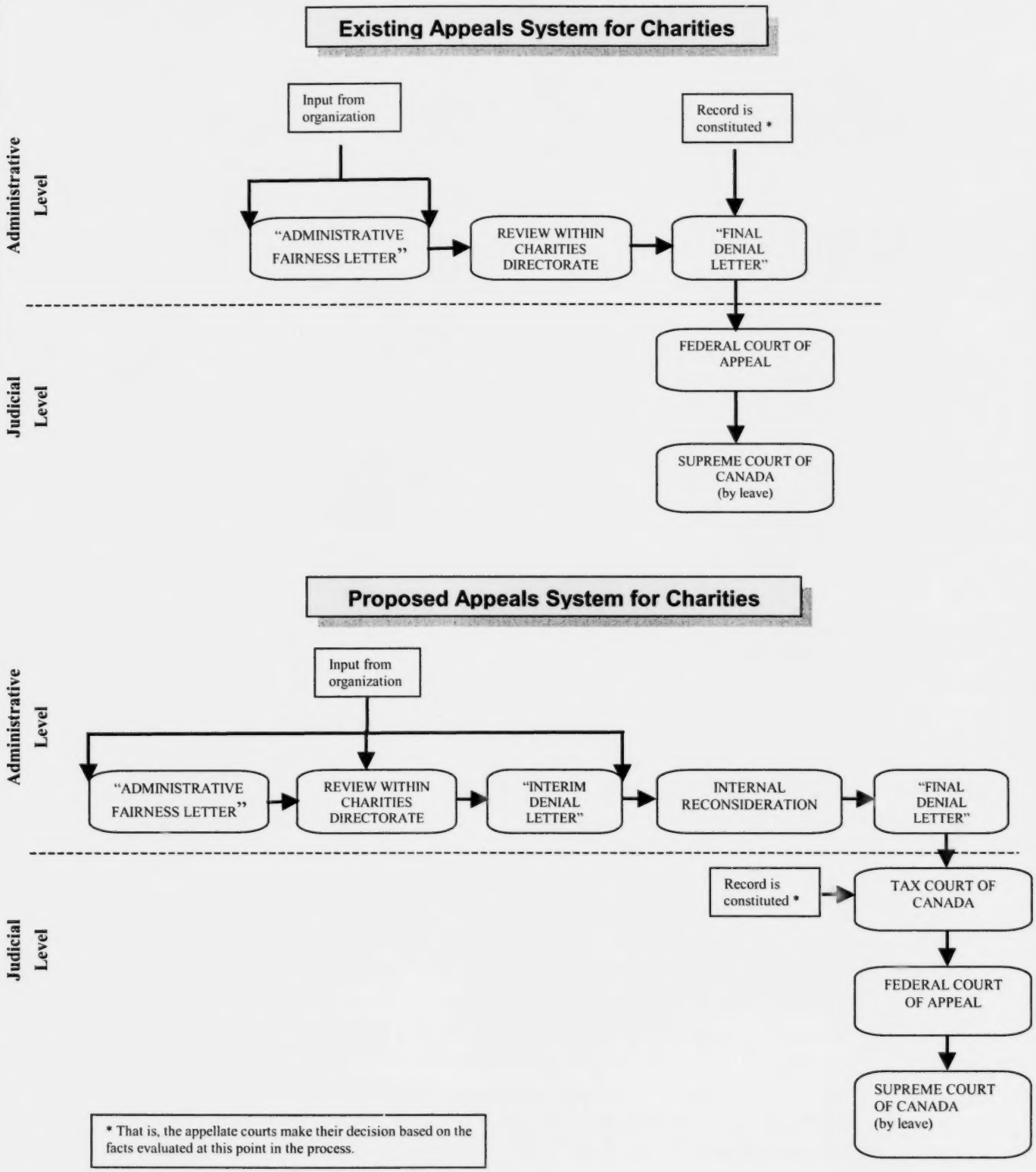
- internal reconsideration[20], within the original decision-making body;
- a hearing *de novo* in the Tax Court; and
- an appeal on the record[21] to the Federal Court of Appeal.

Figure 1 on the following page illustrates the existing and the proposed appeal structure.

[20] These are internal processes within the original decision-making body. Various administrative decision-making bodies employ a wide variety of procedures—some review panels exist within the usual decision-making hierarchy, while others are removed from it; some focus on service complaints, while others study the correctness of the original decision; some accept new evidence, meet with the people seeking recourse, and employ alternative dispute resolution techniques such as mediation and arbitration, while others do not. Review processes are usually private, and decisions are often not published.

[21] This involves an appellate court deciding whether a decision made by lower courts or administrative decision-makers is correct, based on the evidence these decision-makers had before them.

Figure 1:


Existing Appeals System for Charities
Administrative Level
Input from organization
Record is constituted *
"ADMINISTRATIVE FAIRNESS LETTER"
REVIEW WITHIN CHARITIES DIRECTORATE
"FINAL DENIAL LETTER"
Judicial Level
FEDERAL COURT OF APPEAL
SUPREME COURT OF CANADA (by leave)
Proposed Appeals System for Charities
Administrative Level
Input from organization
"ADMINISTRATIVE FAIRNESS LETTER"
REVIEW WITHIN CHARITIES DIRECTORATE
"INTERIM DENIAL LETTER"
INTERNAL RECONSIDERATION
"FINAL DENIAL LETTER"
Judicial Level
Record is constituted *
TAX COURT OF CANADA
FEDERAL COURT OF APPEAL
SUPREME COURT OF CANADA (by leave)
* That is, the appellate courts make their decision based on the facts evaluated at this point in the process.

Internal reconsideration

We propose that an organization should have the right to have its case reviewed by hearing officers. The hearing officers would be a part of the regulatory authority but separate from the initial decision makers. This provides the hearing officers with some degree of independence, although outsiders may still not see them as unbiased.

Internal reconsideration would be easily accessible and virtually cost-free to an organization. Its procedures would be simple, involving a combination of paper reviews, with written submissions and informal meetings (including phone conversations). It would also be speedy. We suggest a maximum of two months for reconsideration, unless both parties agree to extend the process. Reasons for decisions would be provided to the organization, but would not otherwise be made public except in a general report.

Reconsideration should focus on (1) identifying any errors made at the initial decision-making stage and (2) listening to what an organization's representatives have to say. When a misunderstanding is the reason for the dispute, attempts would be made to resolve the dispute by determining whether the law has been correctly understood and applied. However, a hearings officer would be bound by the existing policies of the regulatory authority, although the hearings officer could report an apparent need for change to the head of the authority.

We propose that, as a general rule, internal reconsideration should be mandatory. That is, a dissatisfied organization could not appeal directly to the court, but rather would first have to exhaust the internal reconsideration process. As a new process, reconsideration deserves the opportunity to establish its value in resolving disputes. We believe this can most readily be done by guiding organizations into what will at first be an unfamiliar process. However, an organization and the regulator should be allowed to agree to bypass reconsideration and move directly to court, if they choose to do so because, for example, both recognize that an important legal principle is in dispute that only a court can resolve.

To use an international comparison, in the United States, all applications to the Internal Revenue Service for tax-exempt status are handled centrally, in Cincinnati. An organization that is refused a tax-

exempt status (or receives a letter proposing the IRS will revoke an existing exemption) may appeal to a separate branch of the IRS. (the Appeals Office), by filing a protest within 30 days.

The protest letter must include details such as the aspects of the original decision the organization disagrees with, the facts supporting its position and the law or authority on which it is relying. If requested, a conference can be held. This procedure can be by correspondence or phone. Appeals Office staff can only determine cases according to established precedents and policy. Where there are no established precedents and policy, the matter is referred to Washington where the head office determines the matter. The organization also has the option of having the file referred directly to Washington.

Also, organizations can go directly to court,[22] rather than using the Appeals Office. Or they can go to court if they disagree with the decision of either the Appeals Office or head office. If successful in court, an organization can recover its administrative and legal costs.

In England and Wales, if the Charity Commission[23] decides an applicant does not qualify for registration, it writes to explain why. The organization may write back if it disagrees with the Commission's decision or feels the Commission has misunderstood the application. Such a response triggers an internal review of the decision.

The reviewer is independent of the original decision makers. If the review upholds the negative decision, the organization can then ask for a review by the head of the legal department and ultimately by the commissioners sitting as a board. If the decision is still negative, the organization can then go outside the Commission and appeal to the High Court.[24] Very few cases have gone to the English courts from decisions of the Charity Commission in recent years.

An organization facing removal from the register on the grounds that it no longer appears to be a charity can also ask for an internal review. It remains on the register until the review is complete, but its name is

[22] The court in question would generally be the equivalent of the Canadian Tax Court.

[23] The Charity Commission also has a system in place to handle complaints about its service, as opposed to its decisions. A complainant can turn to an Independent Complaints Reviewer after the complainant has exhausted the Commission's internal procedures.

[24] The approximate Canadian equivalent of the High Court would be the Federal Court Trial Division or the trial division of the provincial superior courts.

removed if the reviewer issues a negative decision. At that point, the organization has a statutory right of appeal to the High Court.

Third-party interventions are allowed. The *Charities Act* allows "any person who is or may be affected by the registration of an institution as a charity" to object to the decision because the organization is not a charity. They also may take the matter to court if the Commission does not allow their objection.

Hearing de novo

We considered three locations for holding such a hearing:

- a specially constituted tribunal to hear charity decisions;
- the Tax Court of Canada; and
- the Federal Court of Canada, Trial Division.

In its *Report on the Law of Charities* (1996), the Ontario Law Reform Commission was critical that the only appeals mechanism provided in the *Income Tax Act* is an appeal to the Federal Court of Appeal. Given the need for expertise in charity law, the Commission favoured creating an intermediate tribunal devoted exclusively to deciding questions of charity law. However, it felt that reducing administrative costs and providing fairness, openness, and a more fully developed record might be more easily achieved by using an existing appeals system: the Tax Court. Hearings would be conducted along the lines of an appeal from a tax assessment, which is fundamentally a hearing *de novo*.

The Commission also recommended that applicants should have an automatic right of appeal if the Charities Directorate has not decided on the application within 90 days, as opposed to the current 180 days.

The idea of a specially constituted tribunal, that would specialize in charity law and potentially allow sector members to bring their expertise in the sector to bear on the decision making, is attractive. While the workload would probably not be enough to justify a permanent body, it would be possible for its members to assemble when needed. However, we have chosen to use an existing court, partly for reasons of efficiency, and partly because the courts would not defer to common law decisions. Therefore, in order to save extra steps

in creating a body of binding precedents, we recommend moving directly from internal reconsideration into the existing court system.

In deciding between the Tax Court and the Trial Division of the Federal Court, there are arguments to be made for both courts. The Trial Division is accustomed to dealing with complex cases and the common law (as well as statute law); involving broad social issues, but has no recent experience with the *Income Tax Act*. The Tax Court, on the other hand, is highly familiar with the *Income Tax Act*, in that it handles virtually all appeals under this Act. However, it is primarily accustomed to dealing with statute law.

While the Trial Division does have simplified procedures for some cases, and case management and dispute resolution tools, the *Tax Court of Canada Act* provides for cases to be decided using either formal or informal procedures. When acting informally, the Tax Court is not bound by any legal or technical rules of evidence in conducting its hearings. This enables the Court to deal with appeals quickly. Neither the formal nor the informal procedures require parties to be represented by counsel. However, decisions rendered under the informal procedure are not precedent setting in the formal sense, and are final in that there is no further right of appeal arising from the decision, although the Federal Court of Appeal can still review them.[25]

Both the Trial Division and the Tax Court under formal procedure could create a satisfactory evidentiary record. Both courts allow for oral testimony. Admittedly, such testimony is likely to be helpful in only some charity cases (those where the facts are in dispute, and credibility is an issue, or when personal information not obtainable through documentary evidence is needed.) However, in cases where oral testimony is not required (primarily those where the matter in dispute is a question of law), the rules could allow the parties to dispense with witnesses. Instead, they would rely on documentary evidence and oral argument, which would result in simpler and less costly proceedings.

[25] The Tax Court's current rules on what cases can be heard under its informal procedures (which turn on such criteria as the amount of tax in dispute) would have to be adapted to the charity context. The possibility of charities using the informal procedure would be conditional on the Court agreeing to change its rules.

On balance, we would recommend using the Tax Court as the hearing court, primarily on the basis that both its formal and its informal procedures make appeals more easily accessible for organizations than the equivalent procedures in the Federal Court Trial Division. This would also be true for geographic access. The Tax Court sits in 68 locations, as opposed to the Federal Court's 17.

Appeal on the record

The existing system, under which appeal from a Tax Court decision on a matter of law or mixed fact and law go to the Federal Court of Appeal, should be followed.

Judicial review of administrative decision making

The Tax Court of Canada does not have the power to judicially review an administrative decision. Accordingly, Federal Court Trial Division would continue to play this role.

Intervenors

We suggest that the current rules established by the various courts provide adequate opportunity for interested parties, including members of the voluntary sector, to present their views in significant cases. Under its formal procedure,[26] the Tax Court, for example, allows a person claiming an interest in a proceeding to apply to the court for leave to intervene. If allowed, the person intervenes as a friend of the court for the purpose of assisting the court with evidence or argument.

In the appeals system we are proposing, sector representatives would have no direct role as decision makers. However, feeding sector expertise into the decision-making process remains a valid objective so as to ensure that the decision making is relevant and practical. This expertise can be supplied, it is suggested, either by way of interventions at the hearing level, or through the use of the ministerial advisory group, as described in the chapter on Institutional Reform.

[26] The Tax Court's current rules do not allow intervenors when it is operating under its informal procedure. While an amendment to the rules to allow for third-party intervention in these proceedings could be sought, it is believed that charity cases using the informal procedure would not likely raise issues of general interest.

We are also not recommending the adoption of a provision similar to that found in the British *Charities Act*, which allows third parties to challenge the decision of the Charities Commission to register an organization. In our view, the possible gain in ensuring that only properly qualified organizations are registered is outweighed by the possibility of harassing legal actions.[27]

Costs

It is necessary to distinguish between costs awarded by the court in the course of its decision, and the various expenses that the parties actually incur before that decision is rendered. Even if the court were to award costs that covered the actual expenditures incurred, which is seldom the case, the fact remains that the parties have to have the money in hand in order to bring the case forward.

We propose that the regular cost rules apply at the Tax Court level. After a hearing, the Tax Court determines whether to award costs and at what level.[28] For appeals from the Tax Court to the Federal Court of Appeal, and from the Federal Court of Appeal to the Supreme Court, the court would determine the level of the costs, and also determine if costs should be awarded against an organization when it appeals and loses. Therefore, above the Tax Court level, the system would look like this:

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[27] However, among the models outlined in the Institutional Reform chapter, under Model 3 (Enhanced CCRA plus Commission) and Model 4 (Charity Commission), the CCRA would have the right to challenge the Commission's decisions. Under Model 1 (Enhanced CCRA) and Model 2 (Enhanced CCRA plus Voluntary Sector Agency), the current system would continue: the CCRA would remain solely responsible for initiating actions designed to correct errors in registration.

[28] The Tax Court Rules summarize the criteria used by the courts in exercising their discretion to award costs as follows:

(a) the result of the proceeding,
(b) the amounts in issue,
(c) the importance of the issues,
(d) any offer of settlement made in writing,
(e) the volume of work,
(f) the complexity of the issues,
(g) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,
(h) the denial or the neglect or refusal of any party to admit anything that should have been admitted,
(i) whether any stage in the proceedings was,
    (1) improper, vexatious, or unnecessary, or
    (2) taken through negligence, mistake or excessive caution,
(j) any other matter relevant to the question of costs.

- If the regulatory authority appeals a lower-level court decision, the regulator would pay the costs of the organization.
- If the organization appeals a lower-court decision, and wins, the regulator would pay the costs of the organization.
- If the organization appeals the lower-court decision, and loses, the organization is responsible for its own costs. Although it would be normal practice for the regulator not to seek its costs, it could seek costs if the appeal was frivolous, or designed primarily to delay a regulatory action. The court would then decide whether the awarding of costs is justified in the circumstances.

Subsidization

We stress again the importance of precedents to the framework employed by the *Income Tax Act* for the registration of charities. More precedents would help to clear up grey areas in the common law and to adapt charity law to changes in society. For this reason, we believe that, in appropriate circumstances, the expenses for developing and presenting a case to the hearing court should be subsidized. Intervenors should also receive funding where their intervention would assist the court in developing the law.

The difficulty lies in selecting appropriate cases for subsidy and in determining how much should be spent. We suggest that the selection be made by a body independent of the regulator. This would avoid placing the regulator in a possible conflict-of-interest and enable it to argue that in fact the law in this area does not need to be clarified.

As for the amount that should be allocated to the program, we note that there is a backlog of issues needing to be addressed. Therefore, the program would initially need higher funding than it would in subsequent years.

Chapter 3: Intermediate Sanctions

Background

De-registration is the main penalty in the *Income Tax Act* for charities that do not comply with the requirements. Once de-registered, an organization faces severe consequences. Not only does it lose the right to issue official donation receipts for the gifts it receives and, potentially, its tax-exempt status, it may also have to pay the revocation tax (Part V tax). This tax requires the organization to pay over an amount equivalent to its remaining assets to another charity or to the government.

Charities can appeal de-registration to the Federal Court of Appeal. The names of de-registered organizations are published in the *Canada Gazette*, and the Canada Customs and Revenue Agency's (CCRA's) letter setting out the reasons for de-registration is a public document.

The *Income Tax Act* also includes other penalties - including penalties for the misuse of certified cultural or ecological property and for inter-charity gifting that is used to cover up a failure to meet the minimum spending requirement (the "disbursement quota"). However these penalties are rarely used.

The Charities Directorate annuls the registrations of organizations which are and have always been non-charitable – those that were registered in error. These organizations do not have to pay the revocation tax. Annulments are always consensual, although if an organization does not agree, it faces de-registration and the revocation tax. If asked, the CCRA can reveal that an organization's registration has been annulled, but no other information about individual annulments is made public.

De-registration is an optional penalty. In practice, the Charities Directorate de-registers charities only if they:

- fail to file their annual return after repeated warnings; or
- are involved in serious or continued non-compliance.

As the following table indicates, few charities lose their registration for serious or continued non-compliance. A "voluntary" de-registration occurs when an organization is ceasing operations.

	1997	1998	1999	2000	2001
De-registrations: voluntary	782	623	727	914	613
De-registrations: failure to file	614	1087	886	2742	2097
De-registrations: "serious"	11	2	6	14	13
Annulments	1	2	7	13	14

On average, the Charities Directorate audits some 500-600 charities each year. Therefore, only 2% of audits reveal problems serious enough for the Directorate to proceed with de-registration or annulment. Roughly one in five audits show no problems or relatively minor ones. A further quarter results in an "education letter," which calls the charity's attention to the legal requirements. This leaves just over half the audits, where the result is to require a written promise by the charity to solve a problem, which the Directorate considers to be non-trivial but remediable.[29]

A number of commentators have stressed the need for intermediate sanctions.

The Ontario Law Reform Commission's *Report on the Law of Charities* (1996) proposed using penalty or excise taxes, either against the charity or culpable fiduciaries, taking into account the importance of the provision in question and the severity of the non-compliance. Taxes collected in this way could go either to defray the cost of administering the legislation or to other charities in the sector.

The *Report* also noted that the CCRA would have an effective lever to encourage compliance if charities had to get their blank donation receipts from the CCRA. The *Report* criticized the existing revocation tax as inconsistent with provincial trust law provisions. It recommended instead that a court transfer the assets of de-registered charities to another charity, and that these assets be protected in the

[29] While some organizations are selected for audit on a purely random basis, most are not. Therefore, no assumptions should be drawn from these figures about compliance patterns in the charitable sector as a whole.

meantime by making a type of sequestration or receivership available to the CCRA.

The Panel on Accountability and Governance in the Voluntary Sector (the "Broadbent Report," 1999) emphasized the need for the CCRA's compliance program to educate charities and give them a chance to resolve identified problems. It proposed a range of compliance actions, including providing information, publicity, and fines, before resorting to de-registration.

The Table on Improving the Regulatory Framework made a number of suggestions in *Working Together: A Government of Canada/Voluntary Sector Joint Initiative* (1999). A dispute resolution process should be available when the infraction is due to ignorance or when the infraction itself is in dispute. Among possible intermediate sanctions, *Working Together* recommended that monetary penalties apply only where a donor or a charity realizes an unlawful monetary gain. The right to issue official donation receipts could be suspended. Publicity can be a powerful sanction and could be combined with a system of formal orders directing a charity to comply. Any intermediate sanctions should be accompanied with an appropriate appeal mechanism.

In his paper "Federal Regulation of Charities" (2000), Patrick Monahan endorsed the proposals put forward in *Working Together*. Arthur Drache, in "Intermediate Sanctions" (1999), suggested a number of possible financial penalties. As a general rule, he would impose the penalty against the organization, rather than the directors or employees. However, if the non-compliance involved an improper transfer of property from the charity, the sanction should be on the person receiving the property.

Factors affecting the creation of a fair and effective sanctions regime

Compliance vs. sanctions

The purpose of a sanctions regime is to obtain compliance with the law. However, people's compliance behaviour is not shaped just by the potential sanctions they face. Also involved is the perception that the penalties are legitimate, and that they are administered fairly and impartially. In practice, as well, the administrative feasibility of a

sanction comes into play. If it is too easy to apply, it may be used too readily; if it is too difficult to apply, it may be used erratically and unpredictably. In both cases, the sanction is unlikely to command the respect necessary to achieve voluntary compliance. Another range of factors in compliance behaviour relates to how complex the rules are and how well they are understood, and whether people have access to expert advice on how to comply with the rules.

Matching the sanction to the non-compliance

The legitimacy of any sanctions regime requires acceptance that the sanction is appropriate to the act of non-compliance. This implies ranking both sanctions and forms of non-compliance according to severity, and assuring an adequate match. It also involves finding a sanction that logically fits the type of non-compliance. If, for example, the type of non-compliance involves the abuse of the official donation receipts, then the penalty probably should focus on the tax-receipting privilege. Or if the cause of the non-compliance is ignorance of the law, then probably any compliance effort should focus on ensuring that the charity is made aware of its legal requirements.

How much discretion should there be in selecting the sanction?

This raises the further question, if more than one sanction is available, of who should be responsible for choosing the appropriate penalty. On the one hand, a case can be made for leaving a good deal of discretion in the hands of the regulatory body so that it can tailor a remedy to fit the case at hand. On the other hand, too broad a discretion leaves charities unsure of what the consequences of non-compliance will be, and opens up the possibility of disproportionate penalties. To avoid this, it might be better to specify the entire regime in detailed legislation that said if a charity does X, then the penalty may be Y. However, the consequence of giving the regulatory authority no discretion as to which penalty to impose is that this authority would also lack discretion not to impose a penalty. If a charity does X, the regulatory authority would have to impose Y, even if there were compassionate or other grounds why the penalty was inappropriate. The proper balance must be found between regulatory discretion, and clear and certain penalties.

What should be in the legislation?

Some may question whether it is even possible to spell out detailed sanctions in legislation. The sceptics will say that charity cases are almost always highly context-specific. Any legislative wording would have to be so general in nature that little certainty would be gained by the exercise. Also, charity law is continually evolving, and novel ways to abuse charitable status emerge regularly, so that the legislation would be continually out-of-date. To counter such arguments, others contend that it should be possible to devise statutory wording that lets charities know what they need to do. They would then at least have a list of all the requirements in one place, which they could periodically refer to as a self-check of their compliance status. Still, a remaining issue is how that list, once set in legislative stone, could be readily amended to match changing circumstances.

What sorts of sanctions are appropriate against charities?

There are a number of issues, especially with financial penalties. Typically, these involve complex legislative provisions, with considerable administrative machinery required to administer them. There is also debate on whether financial sanctions should be levied against the obvious candidate, the organization in question. Against whom do you levy a financial penalty if the charity has no corporate existence (such as a charity constituted as an association)? Why hurt blameless beneficiaries by depriving a charity of funds that would otherwise be spent on charitable programs? But if instead you levy the penalty on the directors or managers, what will be the impact on the recruitment of good people to these positions?

Another issue peculiar to charities is the tremendous variability of the sector. What one charity would consider a serious penalty may have little effect on another. For example, an endowed foundation that is no longer issuing tax receipts would not be affected by a penalty dealing with the right to issue these receipts. But how many different kinds of penalty are necessary? And at what point does the system become bogged down in complexity?

Transparency and public opinion

Yet another characteristic of the charitable sector that has to be borne in mind is its sensitivity to public opinion. If a particular organization is damaging the sector's reputation, perhaps there should be provisions enabling the regulator to promptly address the problem. Yet, presumably no one wants to see that organization's rights unnecessarily or improperly diminished. Public reaction also affects how transparent a compliance program should be. If it is made known that a charity is subject to a penalty, its reputation will suffer. However, without transparency, accountability for the operation of the compliance program becomes difficult and there is no way to reassure the public that an effective regulatory regime is in place.

Should de-registration remain?

If intermediate sanctions are introduced, will it be necessary to retain de-registration as a sanction? If so, should the existing revocation tax stay in its present form?

Who should impose a sanction against a charity?

If the regulatory body does this, then it is combining the roles of police, prosecutor, and judge. If another body at arm's length to the regulatory authority takes on this responsibility, then what sort of body should it be? And should this arm's length body impose all sanctions, or limit its sphere to only the more severe sanctions, lest the regulatory authority become hamstrung by another layer of bureaucracy? What avenues of recourse should a charity have if it disputes the decisions of the regulatory body (or those of an arm's length body)? How, in short, do you balance fairness to charities with an efficient sanctions regime?

Federal and provincial roles

As the Ontario Law Reform Commission has noted, charities are caught between federal and provincial regulation. The issue of regulatory overlap or gaps between the systems needs to be addressed in the context of compliance. A given problem brought to the attention of the federal regulator might be more properly or effectively handled at the provincial level, or vice versa. In another situation, a charity may

find itself with both provincial and federal regulators at its doorstep. Information-sharing, let alone a co-ordinated compliance program, between the various authorities is currently impossible, because each is required to operate under conditions intended to protect a charity's privacy. But is this sufficient reason to duplicate compliance expenditures at both levels, and to place a charity in a form of double jeopardy?

Other regulatory bodies

Somewhat similar is the question of what the federal charities regulator should do if it finds evidence of criminal activity or breach of another statute (such as the federal *Competition Act*). Should it have the authority to bring the evidence to the appropriate authority, on the grounds that the sooner the problem is taken care of, the quicker the potential damage to the charity, its beneficiaries, and the sector's reputation will be repaired? Or should the regulatory authority continue keeping its dealings with charities confidential, at least until such time as it imposes a sanction?

Reform recommendations

The purpose of a sanctions regime is to obtain compliance with the law.

Charities vary enormously in how they administer themselves, the degree of sophistication, asset base, sources of financing, and field of activity. Given this variation, we do not believe that a fair and effective sanctions regime can be achieved that relies only on a single penalty. We also believe that de-registration, currently relied upon as the sole penalty, is too severe for most types of non-compliance.

Obtaining compliance extends to a range of approaches that offer encouragement and support. In developing our proposals, we have assumed that most charities want to meet their legal requirements. Therefore, we have emphasized the need for the regulatory authority to work with charities to inform them of the law and to develop solutions to problems as they occur. The focus is on remediation – on putting things right. The aim is to make a charity stronger, not to drive it out of existence.

A gradated approach to compliance

Below is a description of four proposed levels (or "tiers") of compliance actions, with Tier 1 having the least impact on a charity and Tier 4 the most severe impact. Generally, the regulatory authority would be expected to start with the least severe form of compliance action, and to only resort to more severe forms if this proves necessary. However, as both the severity of the penalty and the discretionary latitude increase, we will also be proposing safeguards to ensure the penalties are applied properly. The table below provides an overview of the four tiers.

Overview of Proposed Compliance Program

Severity of Compliance Action	Type of Compliance Action	Purpose of Compliance Action
Tier 1 (least severe impact on charity)	ADVICE/SUPPORT	To give a charity the information or advice it needs to meet its legal requirements
Tier 2	NEGOTIATED SETTLEMENT	For the charity and regulatory authority to consider the charity's specific circumstances and work out together how a problem can be resolved, with a commitment from the charity to resolve the problem accordingly
	PUBLICITY (charity's name is published on Website or local newspaper)	To obtain compliance with the requirement to file an annual return, in a situation where the facts and law are self-evident, by enlisting the community to remind a charity of the legal requirements

Tier 3 ("intermediate sanctions")	SUSPENSION OF QUALIFIED DONEE STATUS (charity could no longer issue tax receipts for gifts, receive grants from charitable foundations) FINANCIAL PENALTY ON CHARITY (charity loses its tax-exemption, with tax payable being up to 5% of previous year's income, or up to 10% for repeated infractions) FINANCIAL PENALTY ON INDIVIDUAL (individuals connected to a charity, with tax payable being the private benefit obtained, plus 25%)	Two purposes: First two sanctions: to obtain compliance, with the penalty being lifted once the charity meets the legal requirements All three sanctions: to provide a penalty for (and therefore deter) non-compliance, when the infraction is repeated, irreparable harm results, or private benefit is present Penalty amounts to be re-applied to charitable purposes
Tier 4 (most severe impact on charity)	DE-REGISTRATION	Replace existing revocation tax, to ensure assets are applied for charitable purposes

Tier 1 compliance actions: Giving charities the means to comply

Charities must know and understand what is expected of them. Also, they should feel comfortable seeking guidance from the regulator when they are uncertain as to how to proceed. The regulator needs to:

- provide plain-language publications setting out the law,
- organize information sessions,
- promptly provide oral and written responses to questions posed by charities, and
- meet with individual charities at their request.

Charities need to know that they will receive correct information from the regulator and that they can come to the regulator for a frank discussion of problems. We propose that the regulator establish and publicize a policy emphasizing that its role is to help charities comply with the law. Also, the policy must ensure that the regulator, to the extent that its discretion allows, will treat charities leniently when they disclose their problems to the regulator and work with it to resolve the difficulty.

However, the regulator cannot be expected to handle a support role single-handedly. The sector can help by developing networks of charities. The network would bring charities together to share their knowledge and offer opportunities for the more experienced to offer guidance to the less experienced. We also recognize the need for courses, at community colleges and elsewhere, on the role of directors/trustees and charity law.

Tier 2 sanctions: Working with charities to correct a problem

Apart from education and support, negotiated settlements[30] should be a prominent part of the regulator's compliance program. Assuming that virtually all charities wish to comply with the law, these settlements should be sufficient to solve the problem in the vast majority of cases.

The core idea is to obtain agreement between the regulator and an organization about the nature of the problem, and what would put it right and prevent it from happening again. "Nature of the problem" includes the facts and the application of the law to those facts, as well as the reasons why the problem arose. Solutions must vary according to the circumstances at hand. Indeed, if they are to be appropriate, they must reflect the unique circumstances of the case. Such a procedure is modelled on that used in the United States and represents a development from the Charities Directorate's existing practice of obtaining a charity's written promise to correct a problem.

Both the regulatory authority and the charity should treat settlements as a mutual problem-solving exercise. As the two sides put their heads

[30] Strictly speaking, a negotiated settlement is not a "sanction," in the sense that it is not a penalty unilaterally imposed on a non-compliant charity. However, most charities would still probably regard the experience as one they would prefer to avoid.

together, creative ways of resolving a given problem will surely emerge. If necessary, they could agree to use an outside facilitator to help reach an agreement. The regulator should keep track of the various corrective and preventive solutions, evaluate their effectiveness, and develop a list of workable ideas for use in future settlement discussions.

Negotiated settlements attempt to solve problems that are specific to particular organizations. However, this is not a cost-effective approach to types of non-compliance that:

- occur frequently, despite the regulator's educational programs, and
- involve matters of fact and law that are not open to interpretation.

A good example of this type of non-compliance is failing to file the required annual information return. The law states that such a return must be filed, and either a charity did or it did not file the return. Some 2,000 charities are not filing their returns each year, despite a vigorous program of de-registering them for failing to do so.

As an aside, non-filing is a good example of why intermediate sanctions are necessary. The CCRA currently has no other practical means of enforcing the filing requirement short of de-registration. However, de-registration for active charities seems to be both overly severe and administratively unwieldy. Once de-registered, these charities have to re-apply for registration. This ensures the re-applicant meets current registration standards, but the application process is being used, inappropriately, as a form of penalty, and handling re-applications creates an additional burden on the system.

We propose that the regulator should initially use publicity, without first seeking a negotiated settlement, to handle non-filing of annual returns. When the names of non-compliant charities are published, pressure from the local community would serve as a reminder to the charity of its legal obligations. Publication could be on the regulator's Website, in a local newspaper, or both.

The regulator should telephone the charity and send it a written warning at least a month before the charity's name is published. No further action would be taken if the charity sends in its return before the date stated in the warning. If the charity has failed to advise the

regulator of a change of address or phone number, so that it does not receive advance warning, then the charity is responsible for the lack of warning.

On the regulator's side, system accuracy and frequent updating would be pre-requisites. Ideally, a defaulter's name should be removed from the list within a day or so of the return having been received and accepted. Procedures would also be needed to correct quickly (and publicize the correction of) any errors that occur in the listing.

If a Tier 2 compliance action does not correct the problem, the regulator can decide to seek a Tier 3 sanction.

Tier 3 sanctions: Penalties and inducing compliance

We propose introducing three types of intermediate sanctions:

1. suspension of a charity's status as a "qualified donee" under the Income Tax Act.

While suspended,

- the charity could not issue tax receipts for the gifts it receives;
- other charities could not make gifts to it; and
- people making a gift to the charity could not claim a tax benefit on the basis of their gift.

2. a financial penalty on an organization because it has temporarily lost its tax-exempt status. The tax payable would be up to 5% of the charity's previous year's income for first infractions, and up to 10% of this amount for repeat infractions.

3. a financial penalty on individuals connected with a charity in certain circumstances, such as obtaining an inappropriate benefit as a result of their influence over the charity, or approving expenditures they know to be non-charitable. The tax would equal the amount of the benefit or expenditure, plus 25%.

We believe these different sanctions are required to handle a variety of circumstances. A financial penalty on a charity, for example, would be of no use against a penniless organization. Nor would it be meaningful to suspend the qualified-donee status of a foundation that is no longer issuing tax receipts. And if individuals rather than an organization are responsible, then it is appropriate for the penalty to fall on them rather than the organization.

Suspending qualified donee status is a novel sanction. It has a number of advantages, not the least of which is its logical fit with a federal regulatory regime based on the *Income Tax Act.* However, this sanction is difficult to enforce.

As a first step, the regulatory authority should publicize the names of suspended charities, with a warning to potential donors and granting charities. This would enlist the community to monitor the situation, and enable granting charities and donors to quickly check the status of charities that they are considering funding. The charity involved would also have to inform granting charities and donors of its suspended status before accepting any gift.

The regulatory authority should also investigate the possibility of obtaining control over tax receipts, and such a system should be adopted if its feasibility is established. "Control" implies a system under which the regulatory authority can track the organizations that are issuing receipts and which can effectively prevent an organization from issuing receipts if the organization is suspended.[31] Such a system would also address the CCRA's existing problems with counterfeit receipts issued by never-registered groups, and de-registered organizations continuing to issue receipts.

This sanction could be reinforced by imposing a financial penalty on charities that continue to issue tax receipts while under suspension. The regulator would also have the option of proceeding to de-registration if a suspended charity continued to issue receipts despite warnings to stop.

[31] Several mechanisms for controlling receipts have been proposed. For example, for paper receipts, the regulatory authority could issue the blank receipt books itself or license their printing (as banks authorize the printing of cheque books). For receipts a charity issues electronically, it may be possible to flow the transaction through a "gate" maintained by the regulator.

After notice that the regulatory authority intends to impose a suspension, the organization would have 30 days to decide whether to seek recourse. (See below for the proposed recourse mechanisms for sanctions.) If the organization decides not to seek recourse, suspension would go into effect at the start of the first quarter after the 30-day period expires.

Financial penalty on charities. Conceptually, this penalty results from the loss of the organization's tax-exempt status. However, we believe that a charity's pattern of income and expenses are different from those of other taxable entities. It would be difficult, for example, for a charity to deduct much in the way of expenditures made for the purpose of earning income. Therefore, the suggestion is that the tax payable be set at up to 5% of the organization's income obtained from all sources in the previous year. Even if the organization has engaged in several forms of non-compliance, the penalty would remain at most 5%. However, if the organization subsequently repeats the same form of non-compliance, the penalty could rise to 10%.

After notice that the regulatory authority intends to impose a financial penalty, the organization would have 30 days to decide whether to seek recourse. (See below for the proposed recourse mechanisms for sanctions.) If the organization decides not to appeal, the penalty should become payable at the start of the first quarter after the 30-day period expires. The penalty would be payable quarterly; for example, if a total penalty of $10,000 were imposed, $2,500 would come due at the start of each quarter.

We are concerned that, wherever possible, charitable beneficiaries not be harmed by any financial penalty. Therefore, we propose that the money collected in penalties be turned over to charitable purposes. Various ways of doing this are possible. For example, the regulator might apply to the court system for a determination of where the money should go, with the court selecting a charity or charities in the area with similar purposes to that of the penalized charity. This procedure is probably too complex where relatively small amounts are involved, and so we suggest that, if less than $1,000 is involved, the money should simply be payable to the Government of Canada.

Financial penalty on individuals. The existing *Income Tax Act* measures that encourage compliance are not always effective in

ensuring compliance by individuals who have significant influence over a registered charity's affairs. Provision for a financial penalty on directors, trustees, and certain employees of a charity could allow the regulator a more flexible and effective range of sanctions by focusing on specific individuals as well as the charity. As well, such a penalty has the advantage of not taking money from the charity itself.

Financial penalties on individuals are not intended to replace the Criminal Code. If a crime has been committed, then it should be prosecuted as a crime. Rather, we see certain fact patterns where these financial penalties might be useful. For example, a manager of a charity also owns a fundraising company; the charity awards a contract to this company; funds are raised in the name of the charity; and the company retains virtually all of the money. Or, a charity that has had its qualified donee status suspended continues to issue donation receipts, and the directors do nothing to correct the situation.

We are looking for advice on whether financial penalties on individuals should be introduced and, if so, what kind of situations they should apply to. Generally, we would expect that only individuals who participated in the activity, agreed to it or were negligent, would be penalized. Penalties could be based on the value of the funds wrongly disbursed plus an amount of up to 25% of those funds.

After notice that the regulatory authority intends to impose a financial penalty, the individual would have 30 days to decide whether to seek recourse. (See below for the proposed recourse mechanisms for sanctions.) If the individual decides not to appeal, the full amount of the penalty would become payable once the 30-day period expires.

As with financial penalties on charities, we suggest that any amounts over $1,000 collected in financial penalties on individuals be re-applied for charitable purposes. The only distinction between the procedure given as an example previously for reapplying penalty amounts from organizations is that a charity that has suffered harm from the actions of the penalized individuals should be allowed to present a case for the penalty amount to be paid over to it. The regulatory authority may choose to contest this if it has evidence that the charity was negligent or partly responsible for the non-compliance.

Selecting the intermediate sanction. We have concluded that selecting the sanction to be imposed should be left up to the regulatory authority. It will often be obvious which is the most appropriate sanction. Where there is doubt as between suspending qualified-donee status and imposing a financial penalty on an organization, we suggest that suspension is preferable because it does not take from funds the charity has already collected from the public.

We would also allow the regulatory authority to apply more than one of the intermediate sanctions at the same time. Certainly it is possible to foresee circumstances where both the organization and individuals are equally to blame for the non-compliance. There may even be rare circumstances where both suspending an organization's qualified-donee status and imposing a financial penalty on it are called for, for example, a charity that is again abusing its tax-receipting privilege and has previously received a suspension for this reason.

Application of the intermediate sanction. These sanctions can serve two different purposes, as an inducement to comply and as a penalty.

As an inducement to comply, they are intended to persuade organizations to comply with the law. A charity would be able to avoid the sanction entirely if it satisfied the regulatory authority that it had corrected the problem before the date the sanction was due to go into effect. Once the sanction has gone into effect, it would run for a year, but the sanction would be lifted earlier if the charity complies at some point during the year.

We believe these sanctions should be used as a penalty:

- in the case of repeat offences, where the message that the charity must meet its legal requirements needs reinforcing;
- where the harm done to beneficiaries and public confidence in the sector cannot be undone; and
- where charitable status has been abused to the private advantage of individuals or to the damage of the public treasury.

In penalty mode, a sanction on an organization would be imposed for one year. It would continue to run even if the organization corrected its

problems in the course of the year. There would be no provision for avoiding the penalty.

Recourse. The procedures set out in the Appeals chapter for registration and de-registration decisions would also apply to the regulatory authority's decisions to impose intermediate sanctions. The individuals and charities affected could seek recourse by way of internal administrative review and afterwards from the court. The effect of seeking recourse would be to delay the imposition of the sanction.

We have some concern that recourse procedures not be used to unduly delay the application of justifiable sanctions. This is limited to some extent by the requirement proposed for all recourse procedures, that those affected indicate their intention to object within 30 days and that the internal administrative review is completed within 60 days, unless both parties agree to extend the process. Also, as discussed below, the regulatory authority would have the option of seeking an injunction from the court in cases where an individual's or an organization's ongoing non-compliance was creating irreparable harm.

The experience of other countries. The United States introduced new intermediate sanctions in the form of excise taxes in 1996 (those marked with an asterisk in the list below),[32] although there were a number of pre-existing remedies in the *Internal Revenue Code*. Among the sanctions now available to the Internal Revenue Service are:

- a per diem fine on the organization for failure to file the annual return on time or filing an incomplete return;
- a fine of $20 a day on an organization's employee, who refuses to provide a copy of the organization's annual return to a member of the public who has requested it;*
- a tax equal to a percentage of the amount spent on partisan "political activities" and of the amount above the allowable limit spent on "lobbying";
- a tax on income from unrelated businesses;

[32] The new intermediate sanctions are being gradually phased in, and the Table is not aware of any analysis having yet been made of their effectiveness.

- penalties on the organization for issuing inaccurate donation receipts as part of a promotion to understate tax;

- a tax on persons in a position to exercise substantial influence over a charity's affairs for any "excess benefit" they receive from the charity;* and

- taxes of varying rates against private foundations for engaging in self-dealing, for not meeting a minimum spending amount, for excess business holdings, for making imprudent investments, and for making payments for a non-charitable purpose.

The I.R.S. also uses its Website listing of charities to encourage filing on time, in that only the names of organizations that are up-to-date in their filing appear on the site.

The *Code* allows the I.R.S. to enter into "closing agreements" by which it can settle accounts with any taxpayer with finality. Organizations have a strong incentive to negotiate such an agreement, to avoid the loss of their tax exemption. (However, there is no equivalent to the Canadian revocation tax.) Such agreements can include payments to cover I.R.S. costs, but their chief aim is to prevent a recurrence of the problem. To that end, the I.R.S. will go deeply into an organization's operations and require, for example, the restructuring of its board. The closing agreement may also include a provision allowing for publication of the details as part of the settlement.

In England and Wales,[33] the Charity Commission does not exercise sanctions equivalent to the de-registration and revocation tax found in Canada. While the Commission can remove non-charities from the register, the focus of its efforts is on protecting charitable property and taking action against individual directors or trustees. Therefore, there are no financial penalties on organizations, although non-compliant charities are publicly identified.

In practice, the main sanction is holding an inquiry under section 8 of the *Charities Act 1993*. If the Commission's investigators find "misconduct" or "mismanagement" (the terms are not defined), the

[33] England and Wales form parts of a unitary state, unlike the federations of Canada, the United States, and Australia. Many of the powers exercised by the Charity Commission are assigned to the provinces under the Canadian constitution.

Commission can at its discretion invoke a wide range of powers that in Canada are associated with provincial jurisdiction, including:

- appointing a receiver and manager to replace an existing board;
- freezing the charity's assets;
- removing a director or employee; and
- making a scheme that could totally change the constitution of the charity concerned.

Charities are publicly identified when the results of section 8 inquiries are posted on the Commission's Website. The Commission is also now listing the names of charities that are two years behind in their filing requirements. The practice has become known as "naming-and-shaming."

It is also an offence under the *Charities Act*, punishable with a fine, for any "person" not to meet the filing requirements imposed by the legislation. Other offences are also identified. In these cases, the Commission hands the matter over to the police to lay charges. Provisions in the law allow for the free flow of information among the Commission, the police, and various governmental authorities, including the local authorities that license various forms of fundraising.

Tier 4 sanction: De-registration

In our view, de-registration must remain, as a last-resort sanction when all other compliance actions have been unsuccessful, or when the non-compliance is of a particularly serious nature and not capable of remediation.

Recourse, in the case of a proposed de-registration, would follow the procedures set out in the Appeals chapter and noted above in relation to intermediate sanctions.

However, we believe the existing revocation tax is flawed. It is unjust because of its disproportionate impact on some charities depending on their funding sources and the type of assets they hold. Further, as an attempt to protect tax-subsidized donations from being diverted to non-charitable uses, the provision is only loosely connected to this

objective. We have considered several reformulations of this tax, and found none to be satisfactory.

Instead, we believe the best approach is that recommended by the Ontario Law Reform Commission in its *Report on the Law of Charities* (1996: 379):

If de registration is applied as a penalty, then the one hundred percent penalty tax should be imposed in a way that ensures compliance with provincial *cy-près* law. There should also be some type of interim sequestration or receivership intervention available to CCRA. In both cases—deregistration and interim sequestration – CCRA should cede jurisdiction as soon as possible to the relevant provincial authorities.

The existing provisions for "voluntary revocations" should remain largely unchanged. These are requests by a registered charity that its registration be revoked. They occur when an organization is ceasing operations, so that any remaining assets should pass according to the dissolution clause in its governing documents. Such clauses are checked before registration to ensure that any remaining assets will continue to be applied for a charitable purpose. Nevertheless, the charity should be required to file a return with the regulatory authority, establishing that it has properly disposed of its assets. Where there is any question in this regard, the regulatory authority could seek an appropriate order from the court (see below) to direct the proper disposition of the assets.

It is unfortunate that a charity regulator must also occasionally deal with people who are less than honest, and whose actions potentially bring the sector into disrepute. Once the regulator is made aware of a potentially serious problem (for example, by a call from the local police), it has to go out and gather the evidence of such serious non-compliance as would justify a de-registration. Often the organization has not done anything that would clearly put it in breach of the legal requirements; it has simply been collecting money from the public.

The first clear-cut act of non-compliance comes when the organization cannot meet its disbursement quota, which usually falls some 30 months after registration. Add in the various delays for notices and establishing a hearing date, and another year could pass. At this point the organization (along with the money) typically disappears. It then

re-applies under a different name, with different people named as directors, and with an application that would arouse no suspicion.

To counter these cases, it would be useful to add another ground for de-registering a charity – that the registration was obtained on the basis of false or misleading information supplied by the organization in its application for registration. This measure would encourage everyone to take the application process seriously, but it is intended specifically to deal with organizations that use little or none of the funds they collect from the public for charitable work, and whose application for registration misleads both the public and the regulatory authority. Under the proposal, the regulatory authority would not need to establish the existence of non-compliance with the conditions for registration, only that the application was obtained on the basis of false information. The organization concerned would have the usual means of recourse.

Sometimes the regulator will see the same individuals who ran one registered charity off the rails turning up at its door with a fresh application. While naturally suspicious, the regulator may have no grounds to reject the application. The second organization then goes astray and is eventually de-registered. We seek advice on how this situation should be handled. One possibility is to introduce a requirement that a charity can not become or remain registered if a person occupying an influential psotion withing the charity has, within the past five years, been convicted of fraud involving a registered charity or has been subject to the financial penalty on individuals, proposed above..

Special case: Annulments of registration

There are two related matters that are best considered separately. First are annulments. Annulling a registration means treating it as if it had never happened. The power to annul a decision is inherent in any regulatory body as a means of correcting a decision made in error. However, it would be advisable to spell out in legislation (or regulations) the situations when annulment is justified, to give a clear legislative basis for the CCRA's practice of not attempting to reclaim any tax advantages from either the organization or donors during the period before the error is discovered, and to provide a recourse

mechanism. The revocation tax (or replacement for this tax) should continue to be non-applicable to cases of annulment.

We propose that annulment of a registration be possible in cases where the registration was approved:

- as a result of an administrative error; or
- as a result of an application submitted in innocent error by an organization (for example, a subordinate entity mistakenly obtaining independent governing documents and applying for registration on the basis of them, when the constitution of its parent body does not permit the creation of independently established units within itself).

According to existing practice, annulments are consensual, and it may be desirable to make this a requirement in the legislation. However, if the organization disagrees with the regulator's assessment that it is not and has never been a charitable entity, currently it has no direct avenue of recourse.[34] The organization should have access to the recourse system to argue that it is indeed a charity.

All organizations that are under de-registration proceedings should also be allowed to use the recourse system to argue that they should not be de-registered, but rather their registration should be annulled, on the grounds that they never "ceased to comply" with their legal requirements and the regulator erred in initially granting them registration. Whether or not it makes its case, the organization will no longer be registered, but if it obtains an annulment it will not be subject to the revocation tax (or its replacement).

Special case: Orders

The second related subject involves the use of injunctions by the regulatory authority. Occasionally, the regulator is confronted with situations where immediate action is needed to protect the public interest or to prevent the loss of tax-assisted charitable assets. The actual or potential harm is of sufficient magnitude and irreversibility as to justify the regulator seeking a court injunction to curtail the damage until the matter can be sorted out under normal procedures.

[34] The organization has only an indirect means of recourse. It could refuse to accept the offered annulment, wait until the regulatory authority de-registers it, and then appeal.

This power already exists, albeit in undefined form. We propose giving a judge of the Federal Court Trial Division the power to issue such orders, and legislatively define "public harm" to include situations where there are reasonable grounds to believe that:

- tax-subsidized donations from the general public are not being applied for charitable purposes, or
- the general public is being misled either that they can use their contributions to claim a charitable tax benefit, or that their contributions will be used for a charitable purpose.

Spelling out the requirements in legislation

In our view, the requirements for registration are not spelled out clearly enough for charities (or even the regulatory authority) to easily understand the law.

We recommend deleting all the specific grounds for de-registration contained in the *Income Tax Act*.[35] Instead, there should be one general ground for de-registration: failure to comply with the requirements for

[35] The following table summarizes the specific grounds for de-registration listed in the Act.

Provision	Applies to	Grounds for de-registration
149.1(2)(a)	Charitable organizations	Carrying on an unrelated business
149.1(2)(b)	Charitable organizations	Not meeting disbursement quota
149.1(3)(a)	Public foundations	Carrying on an unrelated business
149.1(3)(b)	Public foundations	Not meeting disbursement quota
149.1(3)(c)	Public foundations	Acquiring control of a corporation
149.1(3)(d)	Public foundations	Incurring impermissible debts
149.1(4)(a)	Private foundations	Carrying on any business
149.1(4)(b)	Private foundations	Not meeting disbursement quota
149.1(4)(c)	Private foundations	Acquiring control of a corporation
149.1(4)(d)	Private foundations	Incurring impermissible debts
149.1(4.1)	All charities	Inter-charity gifting to avoid failing to meet disbursement quota
168(1)(b)	All charities	General provision: not meeting requirements for registration
168(1)(c)	All charities	Not filing annual return
168(1)(d)	All charities	Issuing improper donation receipts
168(1)(e)	All charities	Not keeping proper books and record

registration as a charity.[36] Then, a separate section should provide a complete, plain-language listing of what these requirements are, for example:

- to be resident in Canada,
- to file a return,
- to maintain proper books and records,
- to meet the disbursement quota, or
- to issue tax receipts properly.

To permit the legislation to adapt quickly to any new abuses, it should allow new requirements for registration to be introduced by regulation, although only within sufficiently specified areas (for example, with regard to private benefit), so that no undue discretion is given the regulatory authority in identifying compliance issues. Regulations could also be used to clarify some of the requirements, for example, by defining what "resident" in Canada means. However, if the government wishes to introduce any new provision that specifically calls for de-registration as the consequence for non-compliance, our view is that this should only be done by amending the legislation itself.

This represents more than a cosmetic change. First, many of the current specific grounds for de-registration (such as carrying on improper business activities, not meeting the disbursement quota, not keeping proper books and records, not filing the annual return, and issuing tax receipts improperly) are all forms of non-compliance that would be more effectively and appropriately dealt with by methods short of de-registration. Second, by singling out some types of non-compliance for special mention, the Act seems to say that these are the most serious breaches of the law, when in fact other types of non-compliance (such as conferring a private benefit or ceasing to operate in an exclusively charitable manner) may be more significant. Third, and this point applies not just in the context of de-registrations, the Act, as it is currently structured and worded, stands in the way of an effective compliance program. By placing all the requirements for

[36] This does not mean that ignoring any particular requirement would lead to automatic de-registration, but rather that the regulatory authority could decide as a last resort to de-register for non-compliance with any of the listed requirements.

registration in one place and by ensuring the meaning of each provision is clear, charities would better understand what is expected of them

Further simplification of the legislation may also be achievable by deleting certain existing penalties faced by charities and letting the problem be handled by the proposed intermediate sanctions. Among the provisions that could potentially be removed, for example, is the penalty against inter-charity gifting when used to evade the disbursement quota (ss. 188(3) and (4)).

Many other penalties in the Act target forms of non-compliance that charities may be implicated in, but are not exclusively directed at charities. These include, for example, improper disposition of ecological or cultural property (ss. 207.3 and 207.31); misrepresentation by third parties in tax planning arrangements (s. 163.2); and failure to remit source deductions (ss. 227.1(1)). In our view, it would be difficult to justify treating charities differently from others in regard to these penalties, which are designed to target specific infractions.

Co-ordinating the compliance regime with the work of other regulatory agencies

The regulatory authority's mandate currently extends only to the provisions in the *Income Tax Act*. What then should it do if its investigations disclose evidence that an individual connected with a charity is engaged in fraud or another offence? Or if these investigations strongly indicate that the charity itself is in breach of a statute (such as the *Competition Act*)? In our view, the answer is to allow the regulatory authority to disclose the evidence to the appropriate authority. Problems like this will almost always come to public attention anyway, and it is better for all concerned, including the reputation of the sector as a whole, that they be addressed.

More difficult is the case of what to do if the federal regulatory authority's investigations reveal a problem that falls partly or wholly within provincial jurisdiction. There is a good deal of overlap between federal and provincial roles, and the public is unclear which authority has responsibility for what. We suggest that public confidence in the sector is not helped by this lack of clarity. Charities also are often uncertain about the roles of the federal and provincial authorities.

Potentially, they could have investigators from both jurisdictions wanting to see their books at the same time.

We encourage the federal regulatory authority to enter into discussions with the provinces to explore opportunities to reassure the public and to reduce any conflicting demands and duplicative administrative burdens on charities. All governments would need to consider the advantages and disadvantages of allowing a freer flow of information among the various authorities.

Accountability and transparency in the proposed compliance regime

Accountability and transparency are a fundamental aspect of an effective compliance regime. However, it is important to note that the regulatory authority's first duty is to provide the individual charity in question with a full and prompt report of the findings from its investigations.

In considering what to publish and when, the potential harm to an organization's reputation has to be balanced against broader considerations, such as the following:

- reassuring the public, both by demonstrating the regulatory authority is active and by placing the dimensions of the problem, large, small, or non-existent, in the open;
- allowing the sector and the public to judge the regulator's use of its discretionary powers;
- providing a learning tool for both the sector and the public, by pointing out wider lessons in any reports;
- encouraging the community as a whole to serve as a watchdog; and
- creating an intermediate sanction, which we believe almost all charities would consider a powerful disincentive, but which is cost-effective, both in that it does not directly touch a charity's financial resources and in terms of how much it would cost to administer.

However, because of the power imbalance between the regulator and an individual charity, there is the danger that the regulator's definition of

the situation may be given undue emphasis. For this reason, our proposals on transparency are shaped to limit public reporting that names the charity involved to situations where:

- the facts and law are self-evident;
- the organization is not contesting the regulator's interpretation of the facts and law; or
- a court has established the facts and law.

The following table uses the above criteria to summarize the proposed transparency regime.

Transparency in the Compliance Program

Compliance Action	Degree of Transparency by Regulator	Comments
Advice/support	None	The cases are likely to be numerous. While the facts and law are probably self-evident, the community watchdog role is unnecessary. The regulatory authority could use its annual report to describe these cases in an aggregate fashion without naming the charities involved.
Negotiated settlements	Reporting without identifying the charity	Although the facts and law are agreed to as part of the settlement, this type of compliance action presupposes a good-faith effort by both parties to resolve a problem. While reassurance of the public, full regulatory transparency, and the community watchdog role are potentially important in these cases, on balance we believe these factors do not justify the potential harm to a charity's reputation that might result from naming it.

Publicity	List names of charities, with short explanation of the reason for listing the charity	The cases are likely to be numerous. The facts and law are self-evident. Publication is specifically designed to induce compliance.
Financial penalties and suspension	List names of charities or individuals, with a short explanation of the reason for imposing the sanction	The facts and law are likely to be contested, but publication would only occur after recourse rights have been exhausted. These decisions need to be published in a readily accessible fashion, because the public and the sector have to know particularly if qualified donee status has been suspended. Publication in this instance also serves as an additional inducement to comply.
De-registration	Full reporting identifying the charity	A report would only be published, with full details, after the charity has exhausted its recourse rights. A full report should also be given if a court overrules the regulator's proposed de-registration.
Annulments	List names of organizations, with a short explanation of the reason for the annulment	The facts and law would either be agreed to as between the regulatory authority and the organization, or determined in the recourse system.
Orders		These would be public unless the court directs otherwise.

Chapter 4: Institutional Reform

Mandate of the Table

Among its duties, the Joint Regulatory Table was instructed to elaborate on the three models presented in *Working Together*, to consult on those models and report its findings by March 2003.

In fact, we have chosen to present four models for consideration. Our goal in presenting the models for consultation is to gain a better understanding of the implications of the various models, their potential costs and benefits and the degree of support for new institutional arrangements.

The *Working Together* models that we assessed are:

- an enhanced Canada Customs and Revenue Agency (CCRA) that proposes improvements to the existing Charities Directorate within the CCRA;
- an advisory body, the Voluntary Sector Agency (VSA), that would work alongside an enhanced CCRA; and
- a Charity Commission that would assume all regulatory functions currently carried out by the CCRA.

In addition to the three models above described in *Working Together,* we have also identified a hybrid model – very similar to the suggested Canadian Charity Tribunal.[37] This model would leave compliance and audit functions with the CCRA but transfer decision-making powers to register and de-register charities to a new body.

At this stage we are seeking the views of those in the voluntary sector, their advisors, federal and provincial government officials, people currently involved – directly or indirectly – in regulating or supervising charities and the general public on the models presented. It is important to point out that regulating the voluntary sector involves both federal and provincial/territorial governments.

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[37] The Canadian Charity Tribunal was proposed by Arthur Drache and Laird Hunter in the article, "*A Canadian Charity Tribunal: A Proposal for Implementation*" (2000).

Historically, supervising and protecting charity has been the exclusive jurisdiction of the provinces and territories. At the federal level, supervision is focused more narrowly on making sure organizations that are federally registered as charities under the *Income Tax Act* meet their legal obligations, and continue to be entitled to favourable tax treatment. Therefore, we have focused our attention on issues connected with registered charities.

In examining federal regulatory models, the Joint Regulatory Table recognizes that the voluntary sector has regulatory relationships with other levels of government. These relationships have their own history and dynamics. We acknowledge the importance of these relationships and believe there is benefit in exploring opportunities to develop a better co-ordinated system of regulation. With this goal in mind, we welcome the views of interested provincial and territorial governments on the regulatory issues discussed in this paper.

We also recognize that the regulation of charity is not a matter involving only government and the sector. The public has an important "stake" in how charities are regulated.

Charities, as part of the broader voluntary sector, help to cultivate a strong civil society and a federal government connected to citizens. Charities also provide opportunities for individual Canadians to volunteer or work on issues of importance to themselves and their communities. Also, because donors to charities receive tax credits, all Canadians have a financial stake in who is allowed to issue charitable-donation receipts since it is not simply the donor who is giving money – it is also the taxpayer.

For many Canadians, the fact that an organization is a federally registered charity is a "seal of approval" although the government makes it clear that this is not the case.

In this light, we have released this consultation paper and intend to make it widely available. The paper represents our analysis of the issues and examines various models to reflect the range of options that exist. Certain aspects of the models are interchangeable – the task is essentially how best to arrange the various regulatory functions that must be in place and determining the advantages and disadvantages of having various bodies assume some or all of those functions.

How You Can Help

If we are to gain a better understanding of the implications of various approaches, their potential advantages and disadvantages and the degree to which the models meet the needs of various stakeholders, we need to hear from you.

To learn how you can provide comments and/or participate in the planned consultations, go to www.vsi-isbc or call collect at 0 (613) 957-2926.

Background

The Voluntary Sector

The voluntary sector is one of three pillars that make up Canadian society, together with the public[38] and private sectors. Voluntary sector groups touch all aspects of society from education, health, faith, human rights, social justice and environment to arts and culture, sports and recreation. They deliver services vital to Canadians, promote common causes, support economic and community development in Canada and abroad, and raise funds.

The voluntary sector, in its broadest sense, is composed of all not-for-profit organizations that exist in Canada. Some are incorporated; some are not. Organizations range from small, community-based, self-help groups to large, national umbrella organizations and include such organizations as neighbourhood associations, service clubs, symphonies, universities, schools, and hospitals. Some – perhaps most – are designed to provide some form of public benefit, while others are professional or member-benefit organizations. All are dependent on volunteers, at least on their board of directors.

There are two elements to the meaning of the term "not-for-profit." First, the organization cannot distribute any of its income or assets to its members. Second, the organization exists for some purpose other than making a profit. The *Income Tax Act* uses both meanings in its

[38] The public sector includes all levels of government -- federal, provincial, territorial, regional and local.

definition of "not-for-profit organizations," which are exempt from paying tax on their income.

Federally registered charities

Federally registered charities – currently numbering about 80,000 – are not-for-profit organizations in both senses of the term. They do not distribute any profits to members and they exist to serve a public benefit.

For an organization to be federally registered as charitable, it must also be devoted exclusively to charitable purposes.

To determine which purposes are charitable, the courts have relied on the Preamble to England's *Charitable Uses Act* of 1601. The Preamble contains a list of purposes that were regarded as charitable in Elizabethan times. If the purposes of an organization are considered the same or similar to those in the Preamble, then those purposes are charitable. However, the law is not static and over the years the courts have added to the list of purposes which are accepted as charitable. In 1891, the court created four categories of charitable purposes[39]:

- relief of poverty,
- advancement of education,
- advancement of religion, and
- other purposes that have been found to be of benefit to the public and which have been found by the courts to be charitable.

The classification has been used since as a matter of convenience but it is not a precise definition. The "definition" of charity can be found in the case law. There is no legislated definition.

Although the courts still use the four categories, they have long recognized that what is accepted as a charitable purpose must change to reflect social and economic circumstances. This means that a purpose is charitable not only if it is within the list in the Preamble but also if it is similar to any purpose either within it or since held to be charitable.

[39] *Income Tax Special Purpose Commissioners v Pemsel* [1891] AC 531.

For regulators, it means looking at (and regulators are required to determine) whether the proposed purposes of an organization applying for registered status are identical to, or similar to, purposes that a court has previously determined to be charitable.

Status of Regulation of Charities in Canada

As discussed earlier, the regulation of charities in Canada is a matter that involves both the federal and provincial/territorial governments.

At the federal level, rules about registered charities are contained primarily in the *Income Tax Act*. Charities and not-for-profit organizations do not have to pay tax on their income. Charities can also issue tax receipts to donors who may claim their donations to earn a tax credit that reduces donors' tax payable. Charities are regulated because of the benefits they receive in the form of tax assistance. In 2001, federal government revenue not realized as a result of the donation credit for individuals and the deduction for corporations was about $1.5 billion[40].

The *Income Tax Act* is the legislative responsibility of the federal Minister of Finance. The Minister is responsible for bringing before Parliament proposed legislation that affects the tax treatment of charities, as part of the Minister's overall responsibility for fiscal policy of government.

Administration of the *Income Tax Act* is primarily the responsibility of the Canada Customs and Revenue Agency, formerly known as Revenue Canada. The CCRA, in turn, has established the Charities Directorate (formerly known as the Charities Division). It administers the *Income Tax Act* provisions dealing with registered charities.[41]

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[40] This figure is a conservative estimate of the total tax assistance provided to charities as it excludes the sales tax rebates for charities and the benefits associated with the tax-exempt status of charities. If one were to include provincial revenue not realized, this figure could increase to $2 billion.

[41] The Charities Directorate receives approximately 4,000 – 5,000 applications for charitable status each year. On average, three of four or (75 percent) are registered. At present, less information is available about the remaining 25 percent that are not registered. Approximately 100 applicants are formally denied charitable status each year. In other cases, applicants are given what is called an "administrative fairness letter" which requests further clarification about the application. In the majority of those cases, the application is abandoned.

The Charities Directorate is responsible for maintaining a complete and up-to-date register of charities as well as ongoing monitoring and compliance. The Directorate receives applications from those seeking registered charitable status and decides, based on the common law, if they qualify for tax benefits available to them under the *Income Tax Act*.

The Charities Directorate also provides information and advice to registered charities to assist them in complying with the *Income Tax Act* and conducts audits to verify ongoing qualification for the status.[42] The Directorate revokes the registrations of organizations which are no longer charities or which are not complying with the Act.[43]

Provincial and territorial[44] governments also have responsibility for supervising charities within their territory. Constitutionally, it is the provincial governments that are responsible for the establishment, maintenance, and management of charities operating in and for the province, and Parliament has given the same jurisdiction to the Territories. This raises the question of who has responsibility for the regulation of charities that are not "in and for" a province[45]. Ontario has the most developed system, whereby charities are under the jurisdiction of the Office of the Public Guardian and Trustee. Alberta, Manitoba and Prince Edward Island have passed legislation that deals with fundraising by charities (and others) but do not actively supervise charities in other respects. In fact, few provinces actively supervise charities.

Process Leading to Current Review

In 1995, 12 national umbrella organizations covering most parts of the voluntary sector came together as the Voluntary Sector Roundtable (VSR) to strengthen the voice of the voluntary sector. Its goals were to enhance the relationship between the sector and the Government of

[42] Approximately 500 - 600 charities or 0.6 percent of charities are audited annually.

[43] The vast majority of the approximately 2,000 revocations taking place each year result from the failure of charities to file their annual information returns. Research undertaken by the Joint Regulatory Table found that relatively few charities are revoked for other causes. Over the last three years, on average 11 charities per year have been revoked for other reasons.

[44] Each Territory has an Act of Parliament which delegates authority to legislate – which essentially mirrors the division of powers that apply to the provinces. So, for example, the *Nunavut Act* gives the authority to the legislature to make laws relating to hospitals and charities.

[45] *Constitution Act*, section 92(7)

Canada, to strengthen the sector's capacity and to improve the legal and regulatory framework governing the sector.

In 1999, the VSR released the final report of an independent panel of inquiry it commissioned in 1997 to conduct research, consult with the sector and present recommendations about how to promote accountability and governance in the voluntary sector. Known as the "Broadbent Panel", the report it prepared was called *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector.*

The report contained 41 recommendations dealing with a wide range of matters and included a recommendation that the federal government establish a new Voluntary Sector Commission[46] to provide support, information and advice to voluntary organizations and to the public. It was also proposed that this new body have a role in evaluating and making recommendations to the CCRA on applications for charitable status under the *Income Tax Act.*

During this same period, the Government of Canada was also looking at its relationship with the voluntary sector. The Government recognized the need for a strong, vital voluntary sector if it was to meet its goal of improved quality of life for Canadians.

Following the release of the Broadbent Panel report, voluntary sector members and federal officials met in three groups, called "joint tables" to make recommendations on sector/government relationships, to strengthen the voluntary sector's capacity, and to improve regulations and legislation.

Through this process, the Table on Improving the Regulatory Framework was established to explore ways to:

- improve the regulation, administration and accountability of charities and other non-profit organizations, and
- examine federal funding support.

[46] For the purposes of this report, the Broadbent model has been adapted as "Voluntary Sector Agency."

It considered the advisability of creating a new Voluntary Sector Commission as well as other possible models for federal supervision of charities.

On August 29, 1999, the three Joint Tables released their combined report called *Working Together: A Government of Canada/Voluntary Sector Joint Initiative*. *Working Together* presented three models for the federal regulation of charities and the voluntary sector:

- an enhanced Charities Directorate within the CCRA,
- a complementary advisory agency that would work alongside the CCRA (somewhat similar to the Voluntary Sector Commission recommended in the Broadbent Panel report), and
- a quasi-judicial model akin to the Charity Commission for England and Wales.

While the previous Table did not seek consensus on which model was preferred, the *Working Together* report states that "there was widespread support among voluntary sector members of the Table for moving regulatory oversight out of Revenue Canada." Also, they tended to favour the establishment of a quasi-judicial commission, while "government members tended to conclude that any of the three proposed models would work."

Objectives of the Voluntary Sector Initiative

The Voluntary Sector Initiative (VSI), announced in June 2000, recognizes that the voluntary sector represents a vital part of Canadian society. The voluntary sector generates key economic spin-offs and creates hundreds of thousands of jobs. It delivers vital services in each and every community across Canada.

The VSI acknowledges that more needs to be done to support voluntary sector organizations because they strengthen the social, economic and cultural fabric of Canada. At the heart of the initiative is the promotion of two fundamental aspects of a successful nation: economic prosperity and quality of life. The VSI recognizes that Canada's success as a nation has come not only from strong economic growth but also from healthy and strong communities and the voluntary sector organizations that sustain them.

The underlying objectives of the VSI are to help the voluntary sector increase its capacity to meet the needs of Canadians and to work with the sector to improve the government's policies, programs and services to Canadians. These objectives recognize the sector's role in policy advice beyond service delivery.

Voluntary organizations are close to the experience, interests and concerns of their constituents and this connection gives them a unique perspective on policy issues affecting the lives of Canadians. Accordingly, the VSI reflects the voluntary sector's finely tuned understanding of the needs of the people it serves.

Another factor needs to be noted as the process leading to the current review is recounted.

Near the start of the Voluntary Sector Initiative and the work of the Joint Regulatory Table, the Charities Directorate received separate funding to modernize some of its operations and determine how to provide better service. Some dramatic improvements have been achieved. For example, a four-week "fast track" process has been established for the majority (70 percent) of applications that are fairly straightforward. The remaining 30 percent of cases, where there is some degree of uncertainty whether the organization meets *Income Tax Act* criteria, are now processed within three months. In the past, processing times ranged from six months to two years. Efforts are also underway to provide greater public access to information held by the CCRA about federally registered charities. It is anticipated that the annual information returns (T3010s) submitted by charities as well as internal policies and operational guidance will be displayed on an enhanced Website by late 2002.

While we have taken note of these administrative improvements, our own studies are conducted independently of those by the CCRA. Among other things our studies address institutional models, such as those described in *Working Together*, some of which potentially conceive a very different role for CCRA in the regulation of charities. The CCRA has indicated that it intends to deal with any changes resulting from our deliberations and recommendations, together with its internal administrative improvements, under the umbrella of the Agency's Future Directions initiative. This initiative is seeking to align

the long-term activities of the CCRA with the evolving needs of government and Canadians.

Characteristics of an Ideal Regulator

Scope and mandate

It is the responsibility of Parliament to set out the broad parameters in terms of the benefits it is prepared to grant the charitable sector. The role of the regulator – under any institutional model – is to reflect the intent of Parliament through how it administers the provisions of the *Income Tax Act*. Therefore, it is limited in terms of granting benefits but has few limits in terms of designing a supportive and effective regulatory system.

In designing the system, the regulator must strike a balance between maintaining the integrity of the tax system by protecting it from abuse and providing a supportive regulatory environment for charities. The regulator must also consider the cost of achieving those goals.

Another key issue affecting the design of the system is the desire to build and maintain public trust in the regulator and the charitable sector. **Public trust in the regulator** depends to a large extent on its ability to assure the public that charities operating in Canada are being regulated appropriately, coupled with public access to information. At the same time the regulator must minimize the cost of compliance on charities and ensure that resources are used to maximum efficiency.

Sector trust in the regulator is linked to its perception that the regulator is:

- acting fairly and consistently in applying the law,
- committed to keeping the concept of charity up to date and in line with current social developments, statutes and court decisions, and
- involving the sector in a meaningful way in developing administrative policy.

Public trust in charities is linked, at least in part, to their willingness and ability to comply with the law. Another factor is the extent to

which charities are seen by the public to be providing public benefit in exchange for tax assistance.

It is our view that the primary focus of the regulator should continue to be the administration of the *Income Tax Act*. At the same time, we have considered how the objectives of the VSI can be promoted through institutional reform, and what part the regulator plays in supporting the sector so that the sector can enhance the quality of life of Canadians.

We believe that in order to ensure there is public confidence in both the regulator and registered charities as well as to reflect the intent of the VSI, a number of core values are needed to guide the government in designing a supportive and effective regulatory system.

Guiding Values

For the Table, the objective of institutional reform is to have a regulator that is recognized and respected by charities, stakeholders and the Canadian public for its integrity, fairness, knowledge and innovative service delivery resulting in client-oriented service and improved compliance.

The regulator should have accessible, effective, progressive and clear policies that, within the legal framework, guide, support and inform the sector, the public and the regulator. Also, programs should be established that maintain the accuracy and integrity of regulatory decision-making and provide fair, timely and consistent dealings with the public and the sector. The system should encourage voluntary compliance with the rules and necessary sanctions should be applied in a progressive manner. The regulator's staff should be supported with the resources necessary to promote service excellence.

We have identified the following four core values, which we believe the regulator should have.

Integrity

The regulator should provide the highest level of expertise and reach decisions through an impartial, transparent and fair process.

Openness

The regulator should encourage a free exchange of ideas and promote open, timely and constructive communication with those whom it serves – the charities and the public.

Quality Service

The regulator should be committed to delivering high quality services to its clients. It should be the source of timely and authoritative information and advice.

Knowledge and innovation

The regulator should be forward looking and in step with society's needs and expectations. It should use new technology to ensure its services keep pace with changing needs. The regulator should be committed to building its capacities in the following areas:

- **Awareness and understanding of society's needs:** To be effective and relevant to Canadian society, the regulator must be able to gather information about changes that are happening in the environment around it. It should be aware of shifts in public values about what is and is not regarded as beneficial to the public and take this into account in shaping the legal understanding of charity in Canada.

- **Policy development:** To encourage broad participation, the regulator should see ongoing dialogue with the sector, other government departments and the broader community as an accepted way of doing business. The federal government is committed through the VSI to involve the sector in developing policy. A Code of Good Practice on policy development is being developed. The regulator should use this tool to guide its communication with the sector during the policy development process.

- **Continuous learning:** The regulator should have a good understanding of the things it does and does not do well. It should work to continually improve how it fulfils its mandate. To be innovative and responsive, the regulator should provide opportunities for the sector, its advisors and other stakeholders to participate in developing the regulator's priorities and reviewing outcomes. This participation also will provide the regulator with an opportunity to obtain expert knowledge to supplement its expertise.

Also, the regulator should promote staff training and professional development to maintain and improve internal expertise and quality of work.

Other critical success factors

A number of Canadian and international studies have looked at the range of powers and responsibilities for a charities regulator. A listing of these background materials can be found in Appendix 2.

We have reviewed this research and identified a number of common concerns discussed in all studies that must be addressed if the regulator is to be effective in fulfilling its mandate. We have also considered the concerns of some specific authors that go even further and offer our views on those concerns. Our assessment of the issues is provided below.

Support

It is in the interest of the regulator that charities have good administration practices and are effectively organized. This is particularly important since its primary role is to provide confidence that publicly donated funds are being used for charitable purposes. Constitutionally, the federal role in providing support to the sector is limited to compliance with the ITA. It is unclear, therefore, whether it is appropriate for the regulator to fulfil a support role that would go beyond a commitment to inform and assist its clients.

The Panel on Accountability and Governance in the Voluntary Sector suggested the regulatory body should have a nurturing function. We have reached a different conclusion.

Tension and even skepticism sometimes mark the relationship between a regulator and the regulated. There are few situations where a regulator is seen – or wants to be seen – as a "friend" of those it regulates.

This does not mean that the relationship consists of only formal encounters or that the regulator's role is solely punitive.

It is our view that it is the responsibility of any regulator to ensure that those it regulates have the information and understanding they require

to comply with the laws and policies enforced by the regulator. Therefore, there is clearly an educational and support function that the regulator must take on. This function includes such things as making sure that the regulated are aware of the rules that govern them (such as ensuring directors are aware of financial reporting requirements) and have the assistance necessary to comply with those rules. It also includes providing information and advice to the general public and to donors who may wish to have more information about a charity or the tax treatment of their gift before making a donation.

Our recommendations on transparency deal, to some extent, with the awareness issue. Our proposal that operational policies be publicly available and that there be greater public release of information on how and why the regulator comes to its decisions will also help in that regard.

We expect, however, that any regulatory model chosen will go beyond that passive role and take an active role in making assistance available to charities. In England and Wales, one of the most popular activities of the Charities Commission is its regular series of site visits. Commission staff visit various locations throughout the country and meet informally with charities to discuss concerns, issues or questions.

We acknowledge that Charities Directorate staff have, in the past, conducted seminars across the country, largely around the T3010 annual reporting form. These trips are helpful, but do not do enough to address the information needs of charities.

In 2001, for example, 7,700 organizations requested an information session but only a third of these were able to attend one of the 66 sessions held that year. There are a number of reasons for this. The Charities Directorate has little funding to allow its staff to travel to other parts of Canada and it must rely on organizations in centrally located cities to offer space to host the sessions. More resources will be needed to make sure those regulated have the information they require to comply with the laws and policies enforced by the regulator.

Site visits and information sessions – particularly in a country as large as Canada – will not be enough. Whether through call centres, computer technology or otherwise, the staff of the regulatory body must

be available to provide answers – complete, timely and authoritative answers – on questions that are posed by the regulated.

Our view on nurturing should not be taken as a feeling that the nurturing role is not required – only that it is not appropriate for the regulator to fulfil this role.

Clearly, charities do require continuing education in matters of law and practice. Issues as complex as accreditation or best practices, and matters as simple as dealing with questions a charity does not want to put to its regulator, are realities in the voluntary sector. Similarly, the public may not want to put the future of a charity in jeopardy by reporting minor concerns to the regulator. There must be some place for the public and charities to go with such concerns.

In its report, the Panel on Accountability and Governance in the Voluntary Sector wrote at considerable length of the need for and value of umbrella organizations. We agree with those observations. While we understand one of the functions of a regulator is to assist its clients with compliance issues, we believe that there needs to be something similar to "industry associations" that help charities with issues beyond complying with the ITA.

A number of such organizations already exist in many of the fields in which charities operate. From the national umbrella groups to hospital associations to volunteer centres, some organizations provide ongoing support to their members. In many cases, however, these organizations cannot possibly be self-sustaining based on membership fees alone. The resources and diversity of the charitable sector in Canada – where 80% of charities have an annual income of less than $250,000 per year – make it difficult for these umbrella groups to survive financially if they are to serve all charities and not just those that can afford to pay.

We further agree with the Panel on Accountability and Governance in the Voluntary Sector (PAGVS) on the need for a nurturing function. We suggest, however, that it be placed in adequately resourced umbrella organizations. We welcome views on this issue. We also note that there are some issues with the rules regarding the charity status of such organizations. Under current administrative policy, umbrella groups are only eligible if at least 90% of their members are qualified donees. Umbrella organizations also may be disqualified if

they only provide support services and do not deliver charitable programs themselves. We also look forward to comments on whether these are reasonable conditions for the type of supportive organizations we foresee.

Profile/Visibility of the Regulator

One of the purposes of any regulatory system is to assure the public that someone is supervising the activities of the regulated to ensure compliance with the applicable laws. While we know that Canadians have a high degree of trust in charities, we also know that they expect charities to be monitored. One of our concerns is that few Canadians know that there is any formal monitoring of charities and even fewer know who provides that monitoring.

In *Talking About Charities*, a study released in 2000 by The Muttart Foundation and the Canadian Centre for Philanthropy, more than half of the 3,900 respondents said they believed there was a body that was responsible for overseeing the activities of charities. Another 21% did not know whether or not there was such a body. Of those who did believe such a body existed, only 20% (or 5% of the total sample) knew that it was CCRA who had at least some such responsibilities.[47]

A survey commissioned by the CCRA had similar results. The survey, conducted by Ipsos-Reid, examined public awareness, knowledge, and behaviour regarding charitable donations. The vast majority of Canadians (87%) said they were aware that charities must be officially registered before they can issue tax receipts.

However, the survey findings reveal that Canadians have little knowledge about other elements of charity registration. When asked to name the organization responsible for determining whether a charity qualifies to be officially registered, two in three respondents (65%) had no idea and only one in ten (11%) correctly identified the CCRA.

The findings also suggest that Canadians desire more information about the registration of charities. Six in ten respondents (62%) believe

[47] *Taking About Charities*, The Muttart Foundation and the Canadian Centre for Philanthropy, 2000. With the sample size in this study, results are considered to be accurate within plus or minus 0.8%, 19 times out of 20.

knowing the name of the organization responsible for registering charities is very important.[48]

Public trust and confidence is minimized when there is limited knowledge that regulation exists. Therefore, it is important for the regulatory body to make sure that it has a public profile. Such a profile does not come only – or even primarily – from regulatory actions that are taken. There must be a determined effort by the regulator to appropriately establish its presence. Canadians must be aware that the regulator exists, what it does, and what registration as a charity does and does not mean.

Resources

To instil public confidence and trust, the regulator must have the physical, financial, human and technological resources to perform the duties expected of it.

In recent years, a number of concerns have been voiced about the service standards within the Charities Directorate and in particular, the speed with which applications are processed.

Since the announcement of the Voluntary Sector Initiative, there have been some promising signs. The Charities Directorate has received additional resources to allow it to undertake a "Future Directions" program – a modernization effort aimed at closing the gap between potential and current performance.

Yet much remains to be done. The Directorate's offices are scattered around the National Capital Region. It has several computer systems that are not able to communicate with one another. The record-keeping technology has not been updated for many years and no longer meets the management needs of those in charge of the Directorate. It has little funding to allow its staff to travel to other parts of Canada.

What is of particular concern – and something that must be resolved whatever regulatory model is chosen – are the demands that are put on

[48] A total of 2000 Canadian adults were surveyed in two waves of telephone interviews between December 4 and December 13, 2001. The results are considered to be accurate within ±2.2 percentage points, 19 times out of 20, with statistically reliable results for each major region of the country.

people who regulate charities, and the question of how the regulator can better attract and retain qualified staff.

One of the long-standing concerns of management of the Directorate, commentators and charities has been the relatively low classification level and pay of those who must decide on the registration or de-registration of charities.

In many – perhaps most – regulatory bodies, there is a firm set of laws and regulations that are enforced. Contrast that with the Charities Directorate, where there is no clear definition of what the word "charity" means.

Staff in the Directorate are asked to look at applications – many of them filed by well-meaning volunteers with little legal expertise – and determine whether the organization's purposes are charitable. In doing so, they must know charity law well and be capable of taking a wider view of the social and economic circumstances of the day. This task requires considerable skill. Staff require not only suitable background, but also substantial expertise and ongoing professional development.

Few of the people who move into the Charities Directorate do so to make it a career. While staff turnover is common across government, it is particularly harmful for the client groups involved – including marginalized groups and vulnerable citizens. We have learned this is a concern in other countries as well and are looking for suggestions, including those from individuals working in the Directorate, on how this issue could be addressed.

Following the consultation process, we will incorporate these suggestions into our findings on the need for the regulatory body to have sufficient resources. This will include the need for re-examining human resource policies, including the level of pay staff receive and their opportunities for professional development and advancement.

Location of the regulator

There are some who argue that we should not examine any regulatory model that includes the CCRA. The assertion is that the CCRA, as a tax collector, has a conflict of mandates when it is also asked to consider an application that would exempt an organization from paying taxes and allow it to issue tax-credit receipts to donors.

We have included an analysis of what has been termed the "enhanced CCRA" model, both because our mandate directed us to do so and also because we have not found evidence to support the assertion that such a conflict does, in fact, exist.

CCRA administers some 62 statutes on behalf of a variety of government departments, ranging from immigration to agriculture. It collects fees and taxes and it waives fees and taxes.

The argument that CCRA is an inappropriate regulator of charities asserts that when considering whether to register an organization as a charity, examiners consider the foregone revenue that might otherwise be payable to government. In practical terms, this argument can only be about the tax-credits available to donors to charities, since the organization would be unlikely to pay taxes in any event. If it is not registered as a charity, it is likely to be a not-for-profit organization and therefore exempt from taxes.

We acknowledge the sincerity and the concern of those who make such arguments. Yet, we have seen no evidence that the arguments are borne out in practice. If any evidence does exist, we hope it will be presented during the consultation process.

In examining the models, we have considered some of the advantages and disadvantages of having some or all regulatory functions within an existing federal government agency or a standalone specialized entity such as a commission. While we do not believe there is a conflict in mandates in having the CCRA act as the regulator, there may be other inherent conflicts, which may have implications for the models. For example, placing regulatory functions within an existing government agency means the regulator has to meet a range of objectives – those linked to its purpose and mandate plus those of the agency in which it is located. A commission would have a singleness of purpose and limited management layers.

However, there is no guarantee that placing regulatory functions outside a government agency will create fewer administrative difficulties. For example, it has been argued that creating a standalone commission may improve staff retention rates. However, some individuals may feel there is greater opportunity for advancement within a larger government agency as compared with a small,

specialized commission. That being said, the profile and visibility of a standalone regulatory body may be greater than a small, operational unit within a larger government agency. Also, the commission may be able to provide more specialized services to its clients. A commission may also be seen to be more distant from both government and the sector perhaps increasing the perception of objectivity and impartiality in its decision-making.

At the same time, it should be noted that the regulator no matter where it is located would carry out all the same functions and have the same decision making powers as the current regulator. Also, there are a number of advantages to having the regulator within an existing government agency. For example, the regulator would be able to take advantage of existing government infrastructure and services such as legal advice, corporate services and information management systems.

Legal principles and powers to determine charitable status

A number of commentators have suggested the CCRA may be too conservative in its interpretation of the law and, in particular, in its approach to registrations. We have examined this issue. We found that the CCRA approves applications for registration at a rate that is comparable to other jurisdictions including England and Wales as well as the United States. However, similar complaints have been voiced in those jurisdictions as well. Also, varying rules in different jurisdictions make direct comparisons difficult.

One reason for being cautious when registering charities may be the fact that registrations are based almost exclusively on materials submitted by the applicant. There is no systematic process to identify and correct wrongful registrations. Also, there is little ongoing regulatory supervision once the CCRA makes a decision. The process really stops to a large extent at the decision to register.

Concerns have also been expressed about the current approach to political activities on the part of charities. The law states that a charity cannot have a political purpose or be engaged in partisan political activities. Engaging in political activities is allowed to the extent that those activities are non-partisan and a very minor part of the activities and purposes of a charity. This is a broad rule that has created some confusion about what is and is not permitted.

The definition of charity has also provoked much discussion. Some argue that there should be a legal definition of charity. The courts have said that they are ill equipped to make social policy and that those decisions should be made by Parliament or by elected officials. The Panel on Accountability and Governance in the Voluntary Sector proposed such a solution and recommended that Parliament reconsider the definition every 10 years.

The Supreme Court of Canada, in the Vancouver Society of Immigrant and Visible Minority Women case[49], also suggested that Parliament address this issue. Others in the charitable sector oppose such a definition, saying it would create too "rigid" a system and that it would lead to a situation where only "politically palatable" organizations would obtain registration.

The Department of Finance and CCRA are reviewing the administrative and legislative issues related to political activities and charitable status. They have met with representatives of the sector as well as a number of government departments to discuss concerns in this area.

At the same time, a separate, sector-side working group called the Advocacy Working Group, has been established within the Voluntary Sector Initiative to canvass the views of the sector.

The Institute for Media, Policy and Civil Society, in partnership with the Canadian Centre for Philanthropy, conducted consultations with the sector and released the report, *Let Charities Speak,* in March 2002. The report highlights the lack of clarity surrounding the rules on political activity and is critical of the way in which the Charities Directorate administers the *Income Tax Act*.

Many of the concerns described above are not matters of institutional reform, but rather how the regulator applies and interprets the law. The Directorate, acting on the same basis as the courts, works within and interprets the legal rules that determine whether an organization is charitable. These are mainly laid down in decisions of the courts on particular cases rather than set out in Acts of Parliament. Because there is not a precise definition of charity, the Charities Directorate must look

[49] *Vancouver Society of Immigrant & Visible Minority Women v. MNR*, {1999} 1 S.C.R.

closely at those purposes that have already been recognized as charitable.

There may not always appear to be any direct court precedent. In such cases, the Directorate then has to decide (using fundamental legal principles) whether efforts to address problems raised by changing social needs are legally charitable in the same sense as those already accepted as charitable. In reviewing applications, the Directorate must consider whether the court would or would not allow a particular organization to be recognized as charitable. The Directorate does not have the power to change the law beyond the flexibility that is implied in the decisions of the courts. Any changes beyond that would need to be made by the courts or by Parliament.

While in some cases a sufficiently close analogy may be found, in others an analogy may only be found by following the broad principles laid down by the court. Unfortunately, the small number of court cases dealing with what is or is not charitable in Canada does not give the Directorate the guidance it would have if a larger number of legal precedents were available.

Some of these concerns will be addressed through an improved appeals process and increased opportunities to create precedents (see chapter 2 for a discussion of our recommendations on the appeal process).

Co-ordinated Regulation

Regulation of charities is shared between the federal, provincial and territorial governments.[50]

Constitutionally, the provinces have the authority to make laws regarding the "establishment, maintenance, and management of charities in and for the province" by the *Constitution Act, 1867*.[51]

The federal government's regulatory involvement is premised currently on its authority to make rules regarding income taxes. Because donations to registered charities create a tax credit, the federal

[50] Some municipalities have enacted bylaws that also can impact the charitable sector, ranging from taxation of property to regulation of fundraising.
[51] *Constitution Act, 1867, subs. 92(7)*

government, through the *Income Tax Act*, has developed a series of rules regarding the operation of charities.

Among the powers exercised by the federal government, a significant one for the sector is the power to determine which organizations can be registered as charities under the *Income Tax Act*. Supervising the sector at the federal level is focused on making sure organizations that are federally registered as charities under the *Income Tax Act* comply with the Act and continue to be entitled to favourable tax treatment.

In examining new institutional arrangements, we recognize the important role that provinces play in regulating the charitable sector. While our review focused on the situation at the federal level, it also examined areas where both levels of government are involved and found instances where regulation may not be consistent across jurisdictions. For example:

- An organization that is considered to be a charity under provincial law may not qualify for registration as a charity under the *Income Tax Act* and a federally registered charity may not be considered charitable for all purposes (e.g., gaming) in a particular province.

- The provinces have involved themselves in the regulation of charities to different degrees, ranging from virtually no regulation to a significant supervisory authority.

- The *Income Tax Act* does not define the term "gift" and organizations in Quebec are entitled to the application of the Civil Code in determining whether or not a contribution is a gift. This means gift can have a different meaning in different parts of the country.

- It is not clear who has jurisdiction for charities that are not "in and for the Province," in other words, a national organization or an organization that operates in more than one province or on the Internet.

Multiple regulatory structures and rules can create an additional compliance burden on charities. This can also negatively affect public confidence by creating confusion about who is regulating the sector. There is potential for poor co-ordination and overlapping of duties.

A number of possibilities have been suggested. One option is to establish a national regulatory body through which federal, provincial and territorial governments could better co-ordinate the regulation of charities. Another possibility is for some kind of agreement between the federal and provincial and territorial governments, which would take into consideration specific needs of individual provinces and territories.

We are interested in hearing the views of others, including provincial and territorial governments, on these issues.

The broader voluntary sector

Unlike the Joint Regulatory Table that was confined in its mandate to focus on charities and regulatory reform, the Voluntary Sector Initiative was designed to look at more than just registered charities. It was designed to benefit voluntary-sector organizations, whether incorporated or not, whether a registered charity or not-for-profit organization that, for whatever reason, is not registered as a charity.

In the field of regulatory reform, this is a larger problem than, perhaps, it is in some of the other areas of the Voluntary Sector Initiative. It is, for practical purposes, impossible to develop a regulatory system that encompasses all charities and not-for-profit organizations that exist.

For example, some not-for-profit organizations could be registered as charities except for their political activities.[52] In other cases, an organization may have no wish to accept donations for tax-credit purposes, but is clearly serving a public benefit. In still other cases, a group of professionals may band together for mutual benefit. Their interest, while private, is nonetheless acceptable for consideration as a not-for-profit organization. Comparing a condominium association with an organization whose members organize walkathons to raise funds for wheelchairs is difficult. Designing a common regulatory system borders on the impossible, at least within the time and resources available to us.

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[52] The Table does not comment on whether the existing rules related to political activities are appropriate or not. Indeed, it accepts that some legal advisors to charities advise their clients to register as both a charity and a not-for-profit as a matter of course.

As a result, we have concentrated our attention on issues that pertain to registered charities.

Potential Mechanisms

We have explored a number of administrative mechanisms through which the characteristics of an ideal regulator could be realized and the critical success factors identified above could be met.

Public consultation: The Charities Directorate has in the past often consulted with interested stakeholders prior to introducing new policies. However, we believe more could be done to identify areas of mutual concern and create more opportunities for dialogue and feedback, particularly in exploring the boundaries of what is and is not charitable. The regulator, for example, could broaden public input into the administration of charity law through widely advertised consultation. This consultation could take the form of exhibitions, displays and appearances. Regulatory staff should also alert organizations with whom they are dealing when they want to consult with them on a topic which affects the organizations.

Ongoing public consultation would also enable the regulator to identify new trends, contribute to available knowledge about the sector, gather intelligence on areas of concern and plan how to monitor Canadian charities with the input of those most affected.

Annual reporting: This could allow the regulator to communicate to stakeholders on its activities and performance. Such reporting could include:

- statistical information on charity applications, denials, registrations, trends, etc.
- results in aggregate of audits and compliance measures,
- extent of support provided to charities to assist them with compliance,
- outreach and communication activities, and
- levels of expenditure.

Other more general information such as trends in the type of organizations seeking registered status and reasons for de-registration could also be summarized. An annual report may also increase the profile of the regulator vis-à-vis the general public. Other ways to enhance access to information about the performance and activities of the regulator are discussed in chapter 1 on transparency.

Ministerial advisory group: It has been suggested a charities advisory group with membership from the voluntary sector and other government departments could advise the government on improving the policy framework. This body would report to a minister and would oversee a staff team who would be responsible for carrying out the charities advisory group's work plan.

The advisory group would play a key role in encouraging the free exchange of ideas and promoting open and constructive contact between the regulator and the regulated. Its guidance would help senior regulatory officials become sensitive to developments in the sector and make sure that all key internal and external groups are involved in policy development.

The members of the advisory group could represent a wide range of interests and multiple viewpoints, including:

- representatives from the sector,
- regions,
- the general public,
- allied professionals, and
- a range of government departments with a policy interest in the regulatory affairs of charities including, the Department of Justice, Heritage, Finance, Health and Industry Canada.

Officials have a conflict of interest between their duties to ministers and their responsibilities as members of advisory bodies. Public servants are required to provide advice only to a department and minister. To ensure government members have the opportunity to provide information and context for outside members, it is suggested they sit in an ex-officio capacity – meaning they would have no decision-making role. The ministers of the relevant departments

would have the authority to appoint employees to the advisory group. The government would appoint non-governmental members of the charities advisory group. These appointments would be part-time.

This consultative body would have a number of responsibilities and levels of involvement:

- **Administrative Policy Advice:** The primary role of the advisory group would be to provide administrative policy advice on such issues as mechanisms for achieving compliance, the interpretation of the law on charitable status and other areas under the administrative authority of the regulator.

  The charitable sector is vast in terms of both numbers and operational practices. This body would provide those involved in regulation with a "touchstone" against which they can assess proposed policy initiatives, test new ideas and confirm the service required and delivered. As such, it could play a key role in the regulator's cycle of planning, monitoring, evaluating and reporting of results through a minister to Parliament and citizens.

  The advisory group would also have the authority to review in aggregate, registration decisions made by the regulator and provide comment on trends and the quality of decisions being made.

  It has been suggested that the sector have an active interest in monitoring and reporting on illegal activities particularly when they affect the public's perception of charity. The charities advisory group could be asked by the minister to provide advice on the administration of the sanctions regime once provided for in statute. For a discussion of our proposals for a sanctions regime, please see chapter 3.

- **Communication:** To promote open communication and transparency, the advisory group would report on its activities, initiatives and findings as part of the regulator's annual reporting process.

- **Consultation:** The advisory group would take a lead role in assisting the regulator with prioritizing among various initiatives and ensuring development is timely, policy is written in a clear, concise manner and consultation begins early in the development cycle. The advisory group will assist the regulator to explore issues of concern and increase the capacity for institutional learning.

We have considered whether this body should be asked to review and provide direction on specific cases before a final decision is made by the regulator and, in this way, create an opportunity to resolve cases before turning to the courts. We have rejected this idea. It is our view that access to a fair and impartial review process is a more appropriate mechanism through which to resolve disputes and seek guidance. For a full discussion of our proposals for reform of the appeal process, please see chapter 2.

It should be noted that an advisory committee was created within the Charities Directorate in the mid-1980s, but it did not meet regularly, was not adequately funded and no longer exists. Its purpose was to provide the Charities Directorate with administrative policy advice and act as a sounding board for new communications initiatives. Representatives were selected from a cross-section of charities, sector umbrella groups, government departments and charity law specialists. We see a significantly expanded role for the charities advisory group. However, experience of the past illustrates the requirement that this advisory group, if implemented, be adequately funded and supported. To accomplish the tasks outlined for the charities advisory group, there is a need for a dedicated staff.

We are interested in hearing the views of others on the value of establishing a new ministerial advisory group on charities as well as on its structure, composition, role and the resources needed to support it.

Professional development: The need for staff to become more competent in interpreting the legal rules that determine whether an organization is charitable and the need to retain these experts on staff have been identified by us as critical success factors. Mentoring, professional exchanges and other methods exist in other parts of government and in other regulatory bodies to allow for ongoing professional development of regulatory employees.

We are interested in hearing views of the extent to which the mechanisms identified above would address existing concerns.

International Comparisons

In our review of institutional arrangements, we examined the situation in other common law jurisdictions (England and Wales, Scotland, the United States, Australia and New Zealand).

In a majority of jurisdictions we examined, revenue officials initially make the decision as to whether an organization is charitable. This approach is based on the assertion that revenue officials are non-partisan in their determinations of charity registrations and that the tax authority is in the best position to administer the system of tax deductibility, including determining which organizations are eligible for tax exemption.

At this time, the only jurisdiction that has delegated authority to determine registration and de-registration issues to a separate agency, is England and Wales. It is important to note, however, that the government in New Zealand has announced that it will proceed with the establishment of a commission as well. Some commentators have suggested that the delegation of registration decisions and ongoing regulation to a separate agency is justified on the basis of the expertise the Commission has developed in relation to a wide range of charitable matters, including areas that fall under provincial jurisdiction in Canada. This broad-ranging jurisdiction is constitutionally unavailable in Canada. For a discussion of the distinctions between England/Wales and Canada, please see Appendix 1.

Under the *Charities Act*, 1993, Commissioners have the general function of promoting the effective use of charitable resources by:

- encouraging the development of better methods of administration,
- giving charity trustees information or advice on any matter affecting charity, and
- investigating and checking abuses.

There have been some recent developments in other jurisdictions that may be of interest. It should be kept in mind, however, given the different mandates and nature of these inquiries, their findings are not necessarily transferable for the purposes of this review.

In Australia, a recent inquiry into the definition of charities and related organizations recommended establishing a national, independent administrative body for charities and related entities. It also recommended that the government seek the agreement of all state and territory governments to establish the administrative body.

Like Canada, primary jurisdiction over charities in Australia rests with regional governments. The Australian experience suggests a model for the transfer of federal authority to a separate administrative body should the provinces and territories also agree to delegate their jurisdiction over charities to such an agency.

In Scotland, the Scottish Charities Office has responsibility for supervising organizations that have been recognized as charities by Inland Revenue or by the Charity Commission for England and Wales. This includes monitoring compliance with charities legislation and investigating concerns about misconduct and mismanagement.

As a result of a recent inquiry into charity regulation, Scotland is also considering transferring oversight responsibilities for charities to a commission similar to the Charity Commission for England and Wales. Among its findings, the Scottish Charity Law Review Commission report recommends that the new body have the dual role of protecting the public interest and providing an effective support and regulatory system for charities. However, supervising and regulating charities in Scotland is not shared with regional governments, as is the case in Canada.

An inquiry into the registration, reporting and monitoring of charities in New Zealand, released in February 2002, examined three alternatives for the structure of its regime. This included a Charities Commission; a semi-autonomous body within an existing government department with a statutory advisory board from the charitable sector; and a business unit within an existing government department.

The inquiry preferred a Commission for Charities to assume responsibility for the registration, reporting and monitoring of New Zealand charities. It recommended that the Commission be established as a new crown agency with its own statute and regulations. It based its decision on the belief that a Charities Commission would be most acceptable to the charitable sector and that this would mean the costs of monitoring and enforcement would likely be less if the sector supports and has confidence in the organization.

The Crown would appoint commissioners, with a majority drawn from the charitable sector. The new Commission would act as a "one-stop shop" for the legislative requirements of charities.

The inquiry also recommended that the Charities Commission be required to report annually to the sector, and to the government through the Minister of Finance, and to the Minister responsible for the Community and Voluntary Sector. Presently, charities must apply to Inland Revenue (department of taxation) to obtain charitable status. The government of New Zealand has now accepted the recommendation of the inquiry and is moving to a commission model.

Proposed Institutional Models

Summary of models

We considered four models for the federal charities regulator. Three of the models are essentially identical to the three options recommended in the 1999 report "*Working Together.*" These are:

- Model 1 – CCRA, improved as a result of the Future Directions initiative currently underway and through options we propose (regardless of who the regulator is) for a new appeals process, new compliance measures, and greater transparency of the regulatory process;
- Model 2 – an enhanced CCRA with an advisory agency[53], as recommended in 1999 by the Broadbent Panel on Accountability and Governance in the Voluntary Sector and similar to the "agency" described in *Working Together*; and
- Model 4 – a Charity Commission that would assume all regulatory functions currently performed by the CCRA.

We have added a hybrid model:

- Model 3 – a combination of Model 1 and Model 4 that would leave administrative functions in the CCRA but create a Charity Commission to handle the adjudicative responsibilities involved in registering and de-registering charities.

The following description of the four models highlights how the various functions that must be in place have been arranged under each model and some considerations linked to implementing the models.

[53] This is not the ministerial advisory group discussed earlier.

The considerations identified are speculative. It is not possible to know with certainty how the models will work until implemented.

The functional descriptions of the models are followed by a list of evaluative criteria. The criteria are based on our identification of the characteristics of an ideal regulator, critical success factors and other considerations discussed earlier in this paper. We are interested to learn if these criteria are appropriate and if any additional factors should be considered in our final review of the models. A chart summarizing our assessment of the models against the evaluative criteria is provided on page 113.

In reviewing the models outlined below, it should be noted that we are aware that other models for enhancing the relationship between the Government of Canada and the voluntary sector are emerging under other aspects of the Voluntary Sector Initiative. Options under consideration include the appointment of a minister or group of ministers with responsibility for the voluntary sector at the federal level, a secretariat and a Parliamentary committee on the voluntary sector. It will be necessary to determine the interplay between the models described here and one or more of these bodies once recommendations from other Tables are finalized.

Description of Models

Model 1 - Enhanced CCRA

Of the models that we considered, this one is closest to the current arrangement. No regulatory functions would be removed from the CCRA. The CCRA would continue to be an administratively autonomous agency whose empowering legislation is under the policy direction of the Minister of Finance. In other words, the CCRA facilitates and administers the regulations in the ITA that pertain to the charitable sector, whereas the Finance Minister is accountable for the ITA itself including any changes to the Act.

The Director General of the Charities Directorate would continue to report to the Assistant Commissioner, Policy and Legislation Branch and through a chain of command to the Commissioner of the CCRA.

The role of the Charities Directorate would be to continue to reflect the intent of Parliament through its administration of the provisions of the

Income Tax Act pertaining to charities. The Directorate would apply the law in a fair, consistent and open manner through greater transparency of its decision-making processes, the publication of its reasons for decisions and greater emphasis on building the skills of its employees to deal competently with the complexities of charity law.

Applicants would be able to seek a review by an impartial authority of a decision to deny registered status. A description of the existing appeal process and our proposals for reforms are contained in chapter 2. The suggested appeals process is the same across all models.

A charities advisory group would be established to provide administrative policy guidance on such issues as the administration of the sanctions regime, mechanisms for achieving compliance and developments in charity law. It would also identify issues for consultation and strengthen the CCRA's ability to identify emerging issues and trends. As this body is not strictly advising on technical matters it would be advisory to the Minister of National Revenue.

The advisory group would consist of non-governmental charity law specialists and representatives of the voluntary sector. It has been suggested that the CCRA would benefit from involving officials from other government departments on the committee to provide technical advice. However, public servants have a conflict of interest between their duties to ministers and their responsibilities as members of an "independent" advisory group. Therefore, government officials could only participate in an advisory capacity.

Additional resources would be provided to allow the regulator to provide greater support to charities in understanding their legal obligations. Charities Directorate staff would visit various locations throughout the country and meet informally with charities and umbrella groups to discuss concerns, issues or questions. Also, the Directorate would broaden its outreach program to provide greater access to its educational seminars.

Additional support and information would be available through a quarterly newsletter and an enhanced Website. This would assist charities in understanding the rules that govern them federally and make sure organizations interested in seeking charitable status are aware of the application process and eligibility requirements.

Voluntary sector umbrella groups would provide support and assistance to charities with concerns not related to the ITA.

The profile and visibility of the Charities Directorate would be enhanced through a greater presence on the CCRA's Website, annual reporting to the public through its Website on its program activities and achievements, and increased participation in sector and allied professional conferences and symposiums.

Service improvements would also be in place as a result of the Future Directions initiative, now underway within the CCRA. Performance indicators would be established with input from the charities advisory group on registration, policy and communication, compliance, returns and client assistance. Annual reporting on the service expected and delivered would be made publicly available.

The CCRA would also retain responsibility for providing information about charities and the charitable sector to the public. Through its Future Directions initiative, the Directorate would develop and maintain an enhanced Website with a searchable database that would provide greater public access to information about charities including current status, reasons for registration, annual information returns, and any compliance actions taken. A more thorough description of our proposals for enhancing the transparency of the regulator can be found in chapter 1.

Considerations

Since this model is closest to the current administrative structure it is the least costly and least complex to implement. While legislative amendments would be needed to implement our recommendations on transparency and the appeals process, no significant statutory provisions would need to be introduced to implement this model.

At the same time, the Charities Directorate is a very small operational unit within the largest department of government and there is a long history of it being neglected in terms of resources. The Charities Directorate would need additional resources to enhance its operations and profile as well as meet performance expectations.

The CCRA is recognized for its ability and expertise in interpreting and applying the *Income Tax Act*, including the administration of a number

of social benefits such as the Canada Child Tax Benefit. The Directorate's policy development capacity and external consultation program would need to be enhanced.

Model 2 - Enhanced CCRA + Voluntary Sector Agency (VSA)

Under this model, two institutions would have complementary mandates. The CCRA would continue to administer the ITA and make the decisions; the VSA would conduct outreach with the voluntary sector and the public and advise the CCRA on administrative policy. To fulfil such a mandate, the VSA would report to Parliament through a minister.

The VSA, as an arm's length body, would have a presiding board composed of part-time members supported by a professional staff. The latter may be public servants appointed under the *Public Service Employment Act*, but they could also be employed by the presiding board. The head of the staff could be appointed by either the Public Service Commission or by the Governor in Council[54] and the head would answer to the chair of the presiding board. The chair would have statutory authority for the management of the staff and the financial affairs of the agency.

The length of term, for which appointees would serve, reporting relationships, eligibility for re-appointment and conditions under which they could be removed would be set out in legislation.

The VSA would have the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration and by giving charity trustees and directors information or advice on any matter affecting charity (exceeding federal regulatory requirements and including, conceivably, in

[54] Appointments by the Governor in Council are those made by the Governor General on the advice of the Queen's Privy Council of Canada represented by Cabinet and are handled through a distinct process which recognizes the Prime Minister's prerogative to co-ordinate or determine all appointments. The Prime Minister is supported by the Director of Appointments within the Prime Minister's Office who, in consultation with Ministers' offices, is responsible for identifying high calibre candidates who could be considered for such an appointment. The Privy Council Office plays a supporting role to both the Prime Minister's Office and the Clerk of the Privy Council on Governor in Council appointments, and works co-operatively with the Director of Appointments in identifying vacancies and interviewing potential candidates. The Privy Council Office ensures that statutory and procedural requirements are met, and advises on issues of feasibility, remuneration and conditions of appointment.

fundraising, governance practices, and other matters that may fall within provincial jurisdiction).

The VSA would assume the CCRA's compliance education function within its broader education role. The VSA would essentially be a one-stop clearinghouse of information about the entire sector and on best practices in voluntary sector management and administration. This is the only model that includes the mandate to serve the broader voluntary sector and not just registered charities. The CCRA would be called upon to provide advice on developing and implementing the VSA's compliance education program for charities.

The VSA would also act as a champion and promoter of the sector. It would be an interface between government and the sector and represent the concerns of the sector to government. The VSA could potentially pull together support and consultation functions carried out in other government departments, such as Heritage, Human Resources Development Canada and Health. The VSA would also assume part or all of the CCRA's current responsibility for providing public information about charities.

This is the only model without an advisory group because it is assumed that the VSA will perform the advisory function itself. The VSA would provide the CCRA with administrative policy advice and would have the authority to review all decisions made by the CCRA and provide comment, in aggregate, on trends. It would not, however, have the authority to review specific cases.

The VSA and the CCRA would develop guidelines on information sharing and the ability to confer and consult at various organizational levels.

Considerations

The VSA could foster the development of the voluntary sector in Canada by increasing the profile of the sector and creating a central point of contact for information about the sector. However, there may be considerable scope for conflict between the VSA and the CCRA. Although not a decision-making body, the VSA's recommendations would carry significant weight. At the same time, the ability to comment on cases, even in aggregate, without having authority or responsibility for their disposition may create some tension between the

two institutions should the VSA disagree strongly with a CCRA decision and/or its approach to charity files. On the other hand, this input may be useful in helping the CCRA identify issues of concern to the sector and explore possible solutions. Also, having an agency dedicated to voluntary sector issues may encourage greater discussion on the health of the voluntary sector in general and the status of charity law in Canada.

It has been suggested that the VSA act as an interface between government and the sector. This could further enhance the relationship between the sector and government. However, this model may duplicate efforts. While the VSA could potentially pull together support functions in other government departments making it easier to gather information, it may be more desirable to have individual departments with technical and experiential knowledge continue to provide support and information to parts of the sector they deal with most frequently. In addition, the sharing of best practices in voluntary management, for example, may be more effectively and efficiently undertaken by existing sector umbrella groups. At the same time, it should be noted that a number of potential roles described for the VSA are not currently being performed, such as the policy co-ordination and champion roles. Others are under-resourced. The question of roles and resources is presently being discussed in terms of the future governance of the Voluntary Sector Initiative and there is recognition that these new roles have resource implications regardless of the institutional model.

Model 3 - Enhanced CCRA + Charity Commission (Commission)

As under model 2, there would be divided responsibility for the regulation of charities. The Charity Commission would assume most responsibilities associated with administering the ITA as it relates to charities. The CCRA would provide compliance monitoring and auditing functions.

The role of the commission in this model is somewhat narrower than the commission model outlined in the 1999 Report of the Joint Tables. In *Working Together*, the role of the commission was described as follows:

"A quasi-judicial commission would undertake most of the functions currently carried out by the Charities Directorate. It would provide authoritative advice to the voluntary sector, and expert adjudication of appeals on decisions by its Registrar. At the same time, such a commission would have a support function not unlike Model B's agency."[55]

The Commission described here and in Model 4 would have a narrower role than as set out in the previous Table report. It would not have a support function beyond compliance; an impartial authority outside the commission would perform expert adjudication of appeals. The commission would simply assume the current regulatory powers of the CCRA to administer the law. At the same time, it has been suggested that one of the overall purposes of the commission would be to re-examine the issue of registration.

The Commission would not be able to create legal precedent or recognize new charitable purposes where an analogy to a previously recognized charitable purpose cannot be found or developed. However, as in Model 1, applicants would be able to seek a review by an impartial authority of a decision to deny registered status. The Minister of National Revenue could also initiate reconsideration of a charity's registration by applying to the commission but the commission would make the final determination as to conferring status. The Minister of National Revenue would have the right to launch an appeal if the Minister disagreed with a decision of the commission.

As in Model 1, an advisory group would provide policy advice but in this case to the presiding Commission. This is an unusual feature of the model since generally multi-member boards and commissions see themselves as capable of seeing the viewpoints of the sectors involved. It has been retained to ensure the commission has a sense of the full diversity of the charitable sector.

As in Model 2, as an arm's length body, this model would have a presiding commission supported by a professional staff. The latter may be public servants appointed under the *Public Service Employment Act*, but they could also be employed by the presiding commission. The head of the staff could be appointed by either the Public Service

[55] Model B referred to in *Working Together* is equivalent to our Model 2.

Commission or by the Governor in Council and the head of staff would answer to the chair of the presiding commission; the chair would have statutory authority for the management of the staff and the financial affairs of the agency as a whole. The length of term appointees would serve, reporting relationships, eligibility for re-appointment and conditions under which they could be removed would be set out in legislation.

Members of the presiding commission could be drawn from the institutional community (charity law specialists, senior voluntary sector officials, etc.) and have some level of expertise from a legal, sectoral or government perspective. Specific commission composition requirements could be laid out in statute.[56] The day-to-day work of the commission would be carried out by a staff complement of comparable size to the Charities Directorate.

Considerations

It is difficult to predict whether the residual role of the CCRA for compliance monitoring and audit would pose undue problems. There are concerns that if the CCRA is pursuing its own statutory-based, program responsibilities this may result in conflict between the two organizations. There is, however, an example in the ITA of where responsibility for administering tax law for a particular domain has been divided between two institutions. The Canadian Cultural Property Export Review Board (CPERB) may provide a partial model for retaining a role for CCRA in administering charities' compliance with all aspects of the tax law.[57]

To encourage philanthropy the ITA and the *Cultural Property Export and Import Act* provide tax incentives to persons who wish to donate

[56] For example, the Canadian Human Rights Commission has up to eight appointed members. The Chief Commissioner and Deputy Chief Commissioner are appointed for seven years. The other Commissioners have their own professions and contribute to the work of the Commission on a part-time basis. The Commissioners come from different parts of Canada and a variety of backgrounds. There is a balance of men and women. Commissioners meet regularly throughout the year to review cases and discuss the work of the Commission. Another example is the Canadian Cultural Property Review Board whose nine members are also appointed by government. Four are drawn from museums and galleries while the remaining members represent the private sector, collectors, appraisers and dealers. If however, one were not limited by the need for geographic representation, the members of the Commission could be few in number. The Charity Commission for England and Wales, for example, operates with five commissioners, two of whom are part-time.

[57] The CPERB reviews 1500 applications per year.

significant cultural property to Canadian custodial institutions[58], which have been designated[59] to receive or purchase such property. The CPERB is an independent tribunal of the Department of Canadian Heritage, which certifies cultural property for income tax purposes. In addition to certifying whether or not such property meets certain criteria, the Board may also determine the fair market value of the property. Like the CPERB, the commission would make determinations for the purposes of the ITA and provide advice to government on matters under its jurisdiction.

There has been a suggestion that the commission should report directly to Parliament and not to a cabinet minister. Delegating regulatory powers to a new body with direct access to Parliament may increase its visibility and profile through more public reporting to Parliament. It may also increase its independence from political interference. However, there are very few examples of arm's length regulatory bodies reporting directly to Parliament, except on issues of national importance such as access to information and privacy issues, and it would be very difficult to achieve in the short term.

Finally, charities may seek advice more readily from a body not actively involved in monitoring compliance but having two federal bodies involved in regulation may create confusion.

Model 4 - Charity Commission

The Commission described here, as in Model 3, would have a narrower role than as set out in *Working Together*. It would not have a support function beyond compliance; an impartial authority outside the commission would perform expert adjudication of appeals. The only difference between this commission and the one described in Model 3 is that it would assume all current regulatory powers of the CCRA to administer the law. This model differs from Model 1 only in terms of its governance structure, visibility and cost. There would be no direct residual role performed by the CCRA.

[58] Generally, Canadian museums, art galleries, archives and libraries.

[59] Institutions and public authorities, which meet the legal, curatorial and environmental requirements for designation, and have been so designated by the Minister of Canadian Heritage.

However, it must be assumed that co-operative information linkages would have to exist, since many aspects of compliance work, such as the checking of tax receipts, would be severely compromised if there were no communication between the Charity Commission and the CCRA. Care would need to be exercised to ensure that such routine exchanges not affect the independence of the Commission.

Considerations

The stand-alone commission model resolves the problems of divided responsibility. Otherwise, the characteristics and comments about the commission in the preceding model apply.

It is important to reiterate that regulatory bodies, no matter how much at arm's length from government, are bound to apply the law as passed by Parliament and elaborated through regulation (where authorized). There is no formal barrier to a minister – or a commission – exercising a more interpretive, flexible regulatory authority provided Parliament grants the necessary authority. If this authority were thought appropriate, because of the need for transparency and objectivity, it may be preferable for it to be assigned to an arm's length body such as the Charity Commission described here and in Model 3.

Overview of Regulatory Functions

	Model 1 Enhanced CCRA	**Model 2** Enhanced CCRA + Voluntary Sector Agency	**Model 3** Enhanced CCRA + Charity Commission	**Model 4** Charity Commission
Registration/ Sanctions (including de-registration)	CCRA (with advice from the sector)	CCRA (with advice from the Voluntary Sector Agency)	Commission (de-registration on application by CCRA)	Commission
Compliance Monitoring (T3010s)	CCRA	CCRA	CCRA	Commission
Audit	CCRA	CCRA	CCRA	Commission
Administrative Policy	CCRA with advice from charity advisory group	CCRA (with advice from Agency)	Commission (with advice from CCRA and charity advisory group)	Commission (with advice from CCRA and charity advisory group)
Compliance Education & Training	CCRA	Voluntary Sector Agency	Commission	Commission
Non-compliance support & nurturing	Voluntary Sector Umbrella Groups	Voluntary Sector Agency	Voluntary Sector Umbrella Groups	Voluntary Sector Umbrella Groups
Public Information	CCRA	CCRA *or* Agency re: specific charities; Agency re: sector	CCRA *or* Commission re: specific charities; Commission re: sector	Commission

Advisory Committee	Yes to the CCRA	Voluntary Sector Agency performing this role	Yes to Commission	Yes to Commission
Reports to:	Minister of National Revenue (MNR)	CCRA: MNR Agency: MNR *or* Another Minister *or* Parliament	CCRA: MNR Commission: MNR *or* Another Minister *or* Parliament	MNR *or* Another Minister *or* Parliament

Assessment of the Institutional Models

Introduction to evaluative criteria

We have been tasked to elaborate on the institutional models, to consult on those models and report on our findings by March 2003. In meeting this objective, we have reviewed a wide range of issues that may need to be considered in improving the regulatory arrangement for charities at the federal level.

As stated earlier, our objective in conducting this review is to have a regulator that is recognized and respected by charities, stakeholders and the Canadian public for its integrity, fairness, knowledge and innovation resulting in client-oriented service and improved compliance.

Using the models found in *Working Together* as the place to start, we advance for discussion our own formulations of possibilities by which the supervision of charities might be improved. As earlier noted, the mechanisms and structures could be further "mixed and matched" to create another expression of the optimal institutional method of regulating charities. In one sense, the task is how best to arrange the various functions that have to be in place to ensure public confidence in the regulator and the regulated.

We have identified a number of core values and critical success factors in our evaluation of the characteristics of an ideal regulator. These are summarized below to assist readers in forming an opinion about the implications of various models, their costs and benefits and the degree to which the models meet the needs of various stakeholders. Different people will weigh these criteria in different ways.

We wish to hear views on the appropriateness and usefulness of these criteria and the assessment that follows in creating a better understanding of the implications of the models. The input will be incorporated into our report to ministers in the spring of 2003.

Evaluative Criteria

The following evaluative criteria do not appear in any particular order of preference.

Focus of mandate

This criterion speaks to purpose of a regulator under each model. We have suggested that the mandate of the regulator should continue to be the administration of the charities program of the ITA but some additional functions are suggested under one of the models that may broaden the concept of purpose.

Integrity

This criterion highlights the capacity of the regulator to make decisions through an unbiased, transparent and fair process and provide fair, timely and consistent dealings with the public and sector stakeholders.

Openness

The regulator should be open and approachable. While it is not expected that the regulator will always accept the ideas or suggestions put to it, it must communicate what it is doing and the reasons for its decisions. The regulator should encourage a free exchange of ideas and promote open and constructive communication with those whom it serves.

Quality service

The regulator should be committed to delivering high quality, cost-effective services to its clients and should have the means to continually improve its services by seeking to learn both from the things it does and does not do well. Also, the regulator should provide the highest level of expertise available and provide authoritative information and advice to organizations seeking status as well as those it regulates.

Knowledge and innovation

This criterion speaks to the ability of the regulator to be a dynamic, learning institution. To be effective and relevant to Canadian society, the regulator must be forward looking. It should have mechanisms that

allow it to gather information about changes that are happening in the environment around it, including, for example, societal developments than may affect the boundaries of what is and is not considered to be charitable. It addition, the regulator must have the capacity to exploit new technology so that its service keeps pace with changing client needs and public expectations.

Support

It is the responsibility of any regulator to ensure that those it regulates have the information they require to comply with the laws and policies enforced by the regulator. Therefore, there is clearly an educational and support function that the regulator must take on. This function includes such things as ensuring that the regulated are aware of the rules that govern them and have assistance necessary to comply with those rules.

Public profile/visibility

Public trust and confidence is decreased when there is limited knowledge that regulation exists. Therefore, it will be important for the regulatory body to ensure that it has a public profile. Such a profile does not come only – or even primarily – from regulatory actions that are taken. There must be a determined effort by the regulator to establish an "institutional" identity; Canadians must be aware that the regulator exists, what it does, and what registration as a charity does and does not mean.

Resources

This financial criterion addresses two levels of consideration: the direct expense required to establish the new institutional elements and the additional costs to operate that system in comparison to the current arrangement.

Legal principles and powers to determine charitable status

The courts have, throughout the years, said that what is accepted as charitable must change to reflect social and economic circumstances. This criterion speaks to the ability of the regulator to develop further the boundaries of what is and is not charitable.

We have also suggested that the trust of the sector in the regulator is linked in part to the regulator's commitment to keeping the concept of charity up to date and in line with current thinking. This is certainly the case in England and Wales where institutional effort is focused on ensuring the law evolves by eliminating outdated purposes, developing analogies and creating legal precedent in consultation with the sector, Inland Revenue, non-governmental specialists in charity law and other important stakeholders, including the general public.

Co-ordinated regulation

A significant part of the authority to regulate charitable activity is vested in the provinces and territories. This factor speaks to the ease and ability of the institutional arrangement to accommodate or work with provincial and territorial authorities to foster a consistent and coherent set of rules for charitable regulation across jurisdictions. It has been included to gather input from the provinces and others about whether this would be useful and how best to accomplish it.

Broader voluntary sector

The VSI was designed to look at more than just registered charities. It was designed to benefit voluntary sector organizations. While at the federal level supervision is focused more narrowly on charities and we have therefore focused our attention on issues connected with registered charities, we recognize there is an important support role that could be played outside the regulator. This criterion captures support that would be available to the entire sector beyond the assistance provided by the regulator to help charities comply with the ITA.

Transition challenge

There is an element of complexity involved with managing the change implied under each model. This criterion speaks to challenges of improving service levels, transferring regulatory functions and/or creating new institutions as you move across the range of possible models.

Introduction to Analysis Matrix

The following table takes the various models that are described and tests them against the evaluative criteria we have identified. As noted

elsewhere in this paper, the models are not mutually exclusive. It is possible to take some aspects from various models and piece them together to create a regulatory body, that is not specifically outlined in this paper.

It is important to note that in some cases our assessment of a model is necessarily speculative. For example, in the case of the Charity Commission (model 4), much will depend on who the Commissioners are and the rules that they formulate. Similarly, it is not possible to predict how the Charities Directorate's "Future Directions" initiative will affect its ongoing operation.

Assessment of Models

	Model 1 Enhanced CCRA	Model 2 Enhanced CCRA plus Voluntary Sector Agency	Model 3 Enhanced CCRA plus Commission	Model 4 Charity Commission
Focus of mandate	Focus is administering the law	Different mandates for different institutions: CCRA focused on administering the law; VSA focused on support, information provision and nurturing the sector	Focus is administering the law with responsibilities shared between two institutions	Focus is administering the law
Integrity	Regulator would apply and interpret the law acting on the same basis as the courts. Decisions would be subject to review by an impartial authority.	Same as Model 1	Same as Model 1	Same as Model 1.
Openness	Possible through advisory body, public consultation, annual reporting, and a Website where T3010s, the decisions and policies of the regulator, impending legislative amendments, and a searchable database of	Perhaps greatest potential in that organizational focus of VSA is advice and communication	Same as Model 1	Same as Model 1

	Model 1 Enhanced CCRA	Model 2 Enhanced CCRA plus Voluntary Sector Agency	Model 3 Enhanced CCRA plus Commission	Model 4 Charity Commission
	court decisions are displayed			
Quality Service	Possible, performance indicators would need to be established.	Same as Model 1 – in addition, the VSA could provide a watchdog role	Same as Model 1	Same as Model 1
Knowledge and innovation	Possible through greater connection to other government departments and the sector vis-à-vis the advisory body, roadshows, consultations, attendance at annual sector conferences, staff development opportunities, etc.	Gathering and sharing information would be key role of new VSA	Perhaps greater opportunity (as a new body) than in Model 1 to be innovative and tailor its organizational culture to its organizational mandate	Same as Model 3
Support	Possible through site visits, call centres and enhanced Website. Support and education limited to compliance	Perhaps greatest under this model. In addition to compliance support provided by the CCRA as in Model 1, VSA would provide capacity building and nurturing function and could potentially coordinate support functions in other	Same as Model 1	Same as Model 1

	Model 1 Enhanced CCRA	Model 2 Enhanced CCRA plus Voluntary Sector Agency	Model 3 Enhanced CCRA plus Commission	Model 4 Charity Commission
		government departments		
Public profile/visibility	Possible through website, annual report and increased communications capacity	Greater than in Model 1 due to presence of new Agency and requirement to report to Parliament either directly or through a Minister	Similar to Model 2	Similar to Model 2
Resources	$10M in addition to current resources being spent	Higher operational costs than in Model 1 because of new nurturing function and emphasis on broader voluntary sector and not only charities. New infrastructure would be needed for a separate Agency	Greater than Model 1. Operational costs expected to be slightly higher than in Model 1. Also, there would be a one-time cost associated with creating a new Commission	Same as Model 3
Legal principles and powers to determine charitable status	Possible -- capacity to determine charitable status, but cannot make	Same as Model 1	Same as Model 1	Same as Model 1

	Model 1 Enhanced CCRA	Model 2 Enhanced CCRA plus Voluntary Sector Agency	Model 3 Enhanced CCRA plus Commission	Model 4 Charity Commission
	authoritative decisions			
Co-ordinated regulation	Possible – has already demonstrated a capacity to coordinate in area of tax collection with some provinces and territories	Possible	Possible	Possible
Support of broader voluntary sector (non-profits that are not charities)	Not included	Included as nurturing and support function provided by VSA	Same as Model 1	Same as Model 1
Transition challenge	Minimal	Moderate -- Not much change on the regulatory side. New support function developed and placed inside new Agency	Complex -- Most regulatory functions (with the exception of compliance monitoring) transferred to new body	Complex -- All regulatory functions transferred to new body requiring the development of new practices and procedures

Appendix 1

The Charity Commission of England and Wales and the Canadian context

At this time, the only jurisdiction which has delegated authority to determine registration and de-registration issues to a separate agency is England and Wales. In developing models 3 and 4, we looked to this example. While there are some similarities, the Canadian Charity Commission model described in this report has different powers from the one serving England and Wales.

An important distinction is the fact that the Charity Commission for England and Wales is administering the *Charities Act, 1993* which is not the functional equivalent of the *Income Tax Act.* The *Charities Act* gives the Charity Commission for England and Wales jurisdiction over all matters concerning charities including regulatory powers that in Canada fall under provincial jurisdiction, such as providing support and advice to ensure charities have good administrative practices and are effectively organized.

The central role of the federal regulator in Canada – under any institutional model – is to reflect the intent of Parliament through how it administers the provisions of the *Income Tax Act* pertaining to charities.

The *Charities Act* gives the Charity Commission for England and Wales a number of powers not that are not constitutionally available in Canada, which makes comparison sometimes difficult, including the power to ignore previous court decisions that have become outdated and to exercise joint powers with the court in certain administrative functions. This gives the Charity Commission for England and Wales some justification for being regarded as a quasi-judicial body.

Finally, as a standalone agency, the Charity Commission for England and Wales does not report to a minister on its decisions although it does report through a minister on its annual performance.

Appendix 2

List of previous studies and background materials on issues relating to institutional reform.

Canadian studies

Brock, Kathy (ed.). *Improving Connections between Governments, Nonprofit and Voluntary Organizations: Public Policy and the Third Sector.* McGill-Queen's University Press (February 2002).

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Working Together: A Government of Canada/Voluntary Sector Joint Initiative. Report of the Joint Tables (August, 1999). (Available at: http://www.vsi-isbc.ca).

International studies and findings

The Charity Commission Regulation and Support of Charities. Twenty-Eighth Report (1997-98) of the [U.K.] House of Commons Committee on Public Accounts (The Stationery Office, London, 1998).

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First Report by the Working Party on Registration, Reporting and Monitoring of Charities. New Zealand (February 2002). (Available at: http://www.treasury.govt.nz/charities/).

Second Report by the Working Party on Registration, Reporting and Monitoring of Charities. New Zealand (May 2002). (Available at: http://www.treasury.govt.nz/charities/).

Appendix 3

Joint Regulatory Table Members

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